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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GIDDINGS & LEWIS MACHINE TOOL COMPANY,
Petitioner

v.

JOHN AND PATRICIA TRAPANESE,
Respondent

v.

HONORABLE LOUIS H. POLLAK,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS ABUSE ITS DISCRETION IN FAILING TO ISSUE A WRIT OF MANDAMUS WHEN THE TRIAL JUDGE'S ORDER FOR A NEW TRIAL WAS ENTIRELY BASED ON SPECULATION INTO THE THOUGHT PROCESSES OF THE JURORS?

2. DID THE COURT OF APPEALS ABUSE ITS DISCRETION IN FAILING TO ISSUE A WRIT OF MANDAMUS WHERE THERE WAS NO ERROR COMMITTED PRIOR TO THE ENTRY OF THE ORDER FOR A NEW TRIAL AND, IF THERE WAS ERROR, WHERE RESPONDENT DID NOT PRESERVE THIS ISSUE?

3. DOES THE PROPER DEVELOPMENT OF THE LAW OF MANDAMUS AND THE PROPER JUDICIAL ADMINISTRATION OF THE FEDERAL COURT SYSTEM REQUIRE SUPREME COURT INTERVENTION AND CONSIDERATION OF THE EXTENT TO WHICH THE CONCEPT OF "SUPERVISORY MANDAMUS" MAY BE INVOKED TO OVERTURN DISCRETIONARY, BUT "BLATANTLY WRONG", NEW TRIAL ORDERS?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner Giddings & Lewis Machine Tool Company ("Giddings & Lewis") prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this action on March 24, 1983.

OPINIONS BELOW

The Order (without opinion) of the Court of Appeals denying the Petition for Writ of Mandamus of Giddings & Lewis (App. 3a) is not reported. The Memorandum/ Order of the United States District Court ordering a new trial (App. 1a-2a) is not reported.

JURISDICTION

This Petition for a Writ of Certiorari is filed within ninety (90) days after the denial by the Court of Appeals on March 24, 1983 of the Petition for Writ of Mandamus by Giddings & Lewis. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTES INVOLVED

Section 1651 (a) of Title 28, United States Code, and Rules 51 and 59 (d) of the Federal Rules of Civil Procedure, which are involved, are set out verbatim in the Appendix hereto. (App. 33a).

STATEMENT OF THE CASE

Plaintiffs John and Patricia Trapanese initiated this action against Giddings & Lewis Machine Tool Company based on strict liability pursuant to Section 402A of the Restatement (Second) of Torts alleging a design defect in a machine manufactured by Giddings & Lewis. Federal jurisdiction was predicated upon diversity of citizenship and an amount in controversy in excess of $10,000.00 as set forth in 28 U.S.C. §1332. This matter was tried before the Honorable Louis H. Pollak for two weeks. Jury instructions had been prepared by the Court and presented to Counsel for both parties. After discussion they were then presented to the jury without objection or exception. It was agreed by both parties and the Court that instructions on assumption of the risk and contributory negligence were inappropriate since these matters were not issues in this case.

During the first day of deliberations, the jury returned a question to the Court inquiring as to the law of proximate cause. In response thereto the Court read its previous instructions on proximate cause. After deliberating into the evening, the jury retired without a verdict. The jury continued in its conscientious deliberations until early evening on Christmas Eve and once again retired without a verdict. The jury returned on December 27 and after further deliberations returned a unanimous verdict in favor of Defendant.

Judgement was recorded on December 28, 1982. Nine days later Judge Pollak *sua sponte* vacated the Judgment and ordered a new trial. Judge Pollak entered his *sua sponte* Order for a new trial prior to the filing of a motion for new trial by either party and without argument or presentation by either party. The sole basis for Judge Pollak's Order for new trial was his speculation as to what may have been in the minds of the jurors during their deliberations. Although contributory negligence and assumption of the risk had not been issues in the case and although the jury never presented questions to

the Trial Court concerning these issues, the Trial Court ordered a new trial on the speculation that the jury, in its three days of deliberations, may have considered these issues in reaching its verdict. It is clear that the Trial Court made such speculations in an attempt to reverse a verdict which rendered in the Court's opinion an undesirable outcome.

On January 14, 1983, Petitioner filed a Motion for Reconsideration with the Trial Court and requested an opportunity to brief and argue a Motion for New Trial, or in the alternative to certify the question to the Third Circuit Court of Appeals pursuant to 28 U.S.C. Section 1292(b).

Petitioner's request was denied by Order entered February 15, 1983 whereupon Petitioner promptly filed a Petition for a Writ Of Mandamus with the Third Circuit Court of Appeals. The Court Of Appeals permitted the filing of a brief by Respondents and then denied Petitioner's request for mandamus without opinion.

REASONS WHY WRIT SHOULD ISSUE

The Circuit Court of Appeals has so far departed from the accepted course of judicial proceedings by not granting the remedy of mandamus on the basis that the District Court abused its discretion in *sua sponte* ordering a new trial that this Court must exercise its discretionary review. When a District Court has, on its own initiative, ordered a new trial on the basis of conjecture as to what was in the minds of the jury during their deliberations, when no error or prejudice to either party is the basis for the retrial and no error has been preserved by either party, then this court must exercise its power to review and curtail such an abuse of the District Court's discretionary power to order a new trial when its acts usurp the function of the jury and require an unwarranted retrial.

I. THE THIRD CIRCUIT COURT OF APPEALS INCORRECTLY REFUSED TO EXERCISE ITS DISCRETION TO REVIEW BY MANDAMUS THE DISTRICT COURT'S ORDER FOR A NEW TRIAL EVEN THOUGH THE DISTRICT COURT EXCEEDED ITS JUDICIAL POWER BY ORDERING A NEW TRIAL BASED ON SPECULATION AND CONJECTURE AS TO THE THOUGHTS OF THE JURY DURING ITS DELIBERATIONS.

Mandamus is available for interlocutory review "under exceptional circumstances" amounting to judicial usurpation of power. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Where the District Court's Order for a new trial is "blatantly wrong," mandamus relief is indeed justified. *Central Microfilm Service Corp. v. Basic-Four Corp.*, 688 F.2d 1206 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 1191 (1983). Mandamus is proper where the trial Court "has committed a clear abuse of discretion." *Grace Lines, Inc. vs. Motley*, 439 F.2d 1028, 1032 n.2(2d Cir. 1971). While the circumstances are not often found, clearly review by mandamus is demanded when the trial court *sua sponte* orders a needless retrial based purely upon its speculation, after the jury rendered a verdict, as to what might have been in the minds of the jurors during their deliberations.

These cases recognize that mandamus is proper in limited circumstances; a needless retrial based on faulty legal reasoning can be the basis for the appellate court to exercise its discretion to review by mandamus. The exercise of reasoned judicial judgment is the *raison d'etre* of the judicial system. Where a decision of the trial court to grant a new trial is "blatantly wrong," then even the broad discretion of the District Court has been exceeded.

Although an order for new trial normally is not appealable, it is precisely where there has been an abuse of discretion that "the desirability of present review

outweigh[s] the policies which confine appeals to the review of final orders." *Id.* Mandamus must be used to "confine the lower court to the sphere of its discretionary power." *Will v. United States*, 389 U.S. 90, 104, 88 S. Ct. 269, 278, (1967); *Bankers Life & Cas. Company v. Holland*, 346 U.S. 379, 383, 74 S. Ct. 145, 148 (1953).

> Mandamus will lie, in the sound discretion of the appellate court, where the trial court has exceeded or wrongfully refused to exercise its judicial power or has committed a clear abuse of discretion.

Grace Lines, Inc., supra at 1031, n.2 (citations omitted).

Therefore, when the District Court has abused its discretion by ordering a new trial then

> mandamus is required since it is the only way in which the appellate court can correct the egregious error of the district court in setting aside the verdict of the jury and in scheduling a needless retrial.

Id. at 1034.

The Trial Judge concedes, in his Memorandum/Order, that the only reason for his grant of a new trial was that after the jury had rendered its verdict he had given "further thought" to the jury's questions and concluded that when the jury asked a question directed to the issue of proximate cause it may have been considering the issue of contributory negligence which was otherwise not in the case. (App.2a) Petitioner submits that unless this Court grants certiorari and orders the issuance of this extraordinary writ, the mere speculation of a Trial Court as to what might have been in the jury's mind when it considered its verdict will be permitted to be substituted for the valid verdict of the jury after a two week trial and three days of jury deliberations. This Court ought not to permit the proper function of a jury as the finder of fact to be thus subverted; the Trial Court's *speculation* as to what might have led to the ultimate result is a substitution of its judgment for the jury's

verdict and will now subject the parties and the Court to a second trial.

The District Court's new trial order was based entirely on the conjecture that the jury *may* have been concerned with the conduct of the Plaintiff, even though the conduct of the Plaintiff was not an issue for the jury. The Trial Court in its order for a new trial refers to the concerns of the jury during their deliberations and whether they were misguided by these concerns in reaching their verdict. There is simply no rational basis for speculation as to what the jury may have been thinking to be a sufficient basis for a new trial. A district judge may not order a new trial on this basis. Hence, review by mandamus should have been permitted by the Court of Appeals.

In *Grace Lines, Inc., supra,* the jury returned a verdict for Defendant whereupon each juror was polled. The eleventh juror when asked if she found for Defendant replied, "yes it had to be unanimous." *Id.* at 1030. The trial court assumed from this statement that the verdict was not unanimous and therefore declared a mistrial which was then followed by an order for a new trial. Defendant applied for a writ of mandamus to the Court of Appeals which was granted.

The Court of Appeals found that the issue presented was whether the motivation of the juror, as described in her statement, "was so unlawful or improper as to require the court to nullify her vote and therefore the entire verdict." *Id.* at 1031. Even when the trial court had a statement from a juror which implied disagreement with the verdict, it was held that delving into the juror's mind is *impossible* and cannot be a basis for ordering a new trial. *Id.* at 1032. It is simply not permissible to inquire into the motivation of the jury.

> It is not possible to determine mental processes of jurors by the strict tests available in an experiment in physics; we have to deal with human be-

> ings, whose opinions are inevitably to some extent subject to emotional controls that are beyond any accessible scrutiny.

Id. at 1032-33 (quoting *United States vs. Grieco*, 261 F.2d 414, 415-16 (2d Cir. 1958) (per curiam), *cert. denied* 359 U.S. 907 (1959)).

In the instant case, the basis for ordering a new trial is even more speculative than in *Grace Lines, Inc., supra*. In the present case, the jury was polled; the response was unanimous. Absolutely no statements were given as to the motivation of jurors for reaching the verdict. Nevertheless, the Trial Court, nine days post verdict, attempted to delve into the minds of the jurors and based on that speculation *sua sponte* ordered a new trial.

It is well established that mere speculation will not suffice to prove that the jury reached its verdict improperly. *Luck v. Baltimore & Ohio R.R. Co.*, 510 F.2d 663 (D.C. Cir. 1975); 6 A *Moore's Federal Practice* Par. 59.08 [4] at 59-115. Pure speculation is not a sufficient basis to grant a Motion for a new trial. *Pitts vs. Electro-Static Finishing, Inc.*, 607 F.2d 799 (8th Cir. 1979).

The Trial Court's Order for a new trial did not refer to any error which necessitated a new trial, nor did it state that either party had been prejudiced. To order a new trial without any apparent erroneous ruling and, more importantly without any prejudicial error, simply amounts to a substitution of the Court's judgment for that of the jury. This is a trial which took two weeks. The trial was hotly contested. There were three days of conscientious jury deliberations over the Christmas holidays. In such circumstances, the determination of the jury should not be set aside.

"[T]he trial judge should not interfere with the time-honored right of the jury, in the exercise of its collective judgment, to make a just determination of a Defendant's liability and the damages sustained by a Plaintiff for to do so effects a denigration of the jury sys-

tem . . ." *Mainelli v. Haberstroh*, 237 F. Supp. 190, 192 (M.D. PA. 1964), *aff'd.*, 344 F.2d 965 (3rd Cir. 1965). The determination of a jury should not be set aside, except under unusual circumstances. *Fried v. McGrath*, 133 F.2d 350 (D.C. Cir. 1942). A Court should not interfere with a jury's conscientious deliberations. *Mainelli v. Haberstroh, supra.* The trial judge "should *not* act merely as a 13th juror and set a verdict aside simply because he would have reached a different result had he been the trier of fact." *Borras v. Sealand Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978) (emphasis added).

Petitioner therefore contends that it is imperative for this Court to review this abuse of discretion whereby the District Court has usurped the Defendant's right to jury trial, has negated two weeks of extensive trial and *three days* of jury deliberations and will now force the parties into a new trial. It is precisely this wasteful retrial of issues, which were carefully presented to a jury and over which it conscientiously deliberated, that contributes to an already overburdened judicial system. The promulgation of the Federal Rules of Procedure, their interpretation by the Courts, and the relentless opinions by the Judges of the Circuit Courts of Appeals and Justices of this Court have consistently striven to avoid repetitious and unwarranted duplication. Courtroom errors have been found harmless when it was not clear that an error had tainted a jury and verdicts have been left intact. Here we have the Court ordering an entirely new and extensive trial when no known error was committed; instead, the Court speculates that the jury may have considered some extraneous element.

In ordering a new trial on such tenuous grounds, the Trial Judge has merely placed another trial on an overtaxed system. The duplication of litigation occasioned by this type of action has been the subject of repeated criticism by the judiciary, the bar and the public.

A commentator has recently described the judicial overwork:

> The statistics reveal that a monster is loose in the Federal Courts. Fed by 20,000 to 25,000 cases each year, its rampant growth will not soon slow down.

Want, Robert, The Caseload Monster in the Federal Courts, 69 *A.B.A.J.* 612, 615 (1983).

Chief Justice Burger has already noted that there has been an "explosion" in Federal litigation. *Ibid.* at 613. Courts and litigants should not bear the burden of repetitive trials unless absolutely necessary. *General Motors Corp. vs. Lord,* 488 F.2d 1096 (8th Cir. 1973).

II. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FAILING TO ISSUE A WRIT OF MANDAMUS WHEN THE TRIAL JUDGE ORDERED A NEW TRIAL EVEN THOUGH NO ERROR WAS COMMITTED AND, EVEN IF THERE WERE ERROR, SUCH ERROR WAS WAIVED.

The Trial Judge ordered a new trial *sua sponte* pursuant to Fed.R.Civ.P. 59(d). That Rule permits the Trial Court to order a new trial on its own initiative on the same basis for which it might have granted a new trial on the motion of any party. Since there was no error in the Trial Court's instructions and since, in any event, Respondent failed to properly preserve the issue upon which the Trial Court relied in granting a new trial, it was such blatant error to order a new trial that a writ of mandamus should have been issued.

In the face of a jury's adverse verdict, in order to give Plaintiff a new trial, it must be demonstrated that the Court's ruling was not only erroneous but was so prejudicial as to amount to reversible error. Fed.R.Civ.P. 61; *Skill v. Martinez,* 677 F.2d 368 (3d Cir. 1982); *Kube*

v. Bethlehem Steel Corp., 390 F.2d 506 (3d Cir. 1968). Clearly, the Trial Court, in its Order for a new trial, makes no mention of error or prejudice to either party.

There is no contention by the Trial Court that something occurred in the course of the trial which resulted or which may have resulted in the jury receiving "a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible." *Lind v. Schenley Industries, Inc.*, 278 F.2d 79,90 (3d Cir.), *cert. denied*, 364 U.S. 835, 81 S. Ct. 58 (1960); *O'Neil v. D.R. Grace & Company*, 410 F.2d 908, 914 (5th Cir. 1969).

Instead of referring to an error or prejudice to either party (which did not occur), the Trial Court attempted to delve into the minds of the jurors and speculate on their thoughts and secret deliberations. Clearly, such an attempt is conjecture and cannot serve as a basis for ordering a new trial.

During the first day of deliberations, the jury presented the following question concerning proximate cause which the Trial Judge partially utilized as the basis for his new trial Order: "Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the accident, or is it only necessary to feel that it contributed to the accident?" (App. 10a). The Trial Court told counsel that this question on proximate cause would be best answered "simply by re-reading to the jury what I said about the sixth element, which is about proximate cause." (App. 11a). At that time, neither counsel raised the possibility that the jury might be considering contributory negligence of the Plaintiff when it asked this question about causation. The Court then re-read its instructions on proximate cause, and neither party objected or took exception to the charge as then given. (App. 15a).

Only after the jury retired that day did counsel for Plaintiff begin to speculate that the jury might be considering the conduct of Plaintiff in their deliberations (App. 18a) and brought this to the attention of Judge Pollak. At that time Judge Pollak responded that he

> would be quite troubled about introducing a new point for charge at this time, especially one [that] would seem so programmatically geared to saying, 'Don't go down a particular line which somebody is worried you may be on.' I think the charge as we gave it was a coherent whole which focused the jury's attention on the elements which if proved would entitle the Plaintiff to a determination of liability, and I think they should know from the answer which they have received to *their question about proximate cause the proper theories to proceed on*. (App. 18a) (Emphasis added).

Counsel for Defendant brought to the Court's attention that when the charge was made to the jury it was *agreed upon by both attorneys with no exceptions*, and was fair, reasonable and correct in its statement of the law. (App. 19a). Counsel for Plaintiff thoroughly agreed stating "I am not taking away the charge as given, it's correct" (App. 20a), but based on his speculation, counsel for Plaintiff requested the Court to inject an entirely new instruction on contributory negligence. The Court forcefully declined stating:

> (I) think the injection of such a new line of legal discussion at this time is so likely to have a kind of coercive effect on the jury's thinking as to be read by them as an impulsion from the Court to decide this case in favor of the Plaintiffs on the liability side, I think the risk of that is so substantial, Mr. Schwartz, that I think that would be a wrong thing to do. I am not arguing that had the charge contained such an injunction about the nonrele-

> vance of contributory or comparative negligence that the charge would have been erroneous in some reversible-error sense. I thought it would have been a mistake, and for [that] reason declined so to instruct the jury, as I would not instruct the jury on lots of matters which are not in my judgment pertinent to the statement [such as] these are the claims that are to be made and these are the appropriate defenses, but although I would not have regarded it as reversible error, I can put myself in the position presumably of somebody who would have to review such a charge to have included an analysis of the kind that you would argue, I thought it the better part of prudence not to include anything of the sort, and now to do so, unvarnished as a new injection not in the context of a whole large reorganization of a whole conceptual framework would seem to me a wrong thing to do, a form of judicial intervention in the jury's processes that I don't think I am authorized to pursue. (App. 20a, 21a).

What the Court unhesitatingly decided, when the trial was fresh in the Court's mind and the jury instructions were meticulously prepared and correctly given, was that an instruction on contributory negligence would be an error and usurpation of the jury processes. How could such an instruction therefore suddenly become a correct and necessary instruction nine days after the verdict? Not only did the Court find that such an instruction would be wrong and an intervention with the jury, but the Court also found that any need for such an instruction was based entirely on speculation, speculation by counsel for Plaintiff with which the Court did not agree.

On day two of deliberations, the jury once again posed the same question on proximate cause, asking, "Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the acci-

dent, or is it only necessary to feel that it contributed to the accident?" (App. 23a) The Trial Judge remained firm and, in response to counsel's conjecture as to what the jury was thinking that caused it to ask the question, the Court dismissed this conjecture as arbitrary speculation.

> Mr. Schwartz, of course we are all speculating. I tend to think that you are wrong in your speculation that primary means to the jury first in time, because the form of their question, if you remember, was, "Is it necessary to feel the defective condition was the primary cause or the most probable cause of the accident, or is only necessary," and so forth. I read their question as one which equates primariness and probability, and I remain of the view that it would not be appropriate for me to volunteer to postulate about contributory negligence. Had the jury asked, that would be something else again. (App. 27a)

Thus, the Court found that speculation as to what was in the mind of the jury was to be given no weight, which is precisely the value that the court in *Grace Lines, Inc. supra*, and *United States v. Grieco, supra*, placed on such speculation.

Furthermore, as noted by the Trial Court at the time, the jury never asked about contributory negligence or the conduct of the Plaintiff. Their questions concerned proximate cause and the answers to those questions given by the Court correctly and clearly explained the meaning of proximate cause to which neither party made objection or took exception.

The failure of either party to make an objection or take exception to the Trial Court's refusal to instruct the jury on contributory negligence is significant. The failure of a party to object to the Trial Court's decision precludes the Trial Court from ordering a new trial on the basis that the Trial Court's decision was an error.

Harkins v. Ford Motor Co., 437 F.2d 276 (3d Cir. 1970); Wright & Miller, 11 *Federal Practice & Procedure* §2805 at 39; *See Wiggs v. Courshon*, 485 F.2d 1281 (5th Cir. 1973).

It is Hornbook law that the failure to object to a Court's response to a jury on a jury's request for additional instruction precludes the raising of that issue on appeal when Counsel had the opportunity to object. *Nimrod v. Sylvester*, 369 F.2d 870 (1st Cir. 1966); 5a *Moore's Federal Practice* Par. 51.04 at 51.27; F.R.C.P. 51; *Holloway v. J.B. Systems. Ltd.* 609 F.2d 1069 (3rd Cir. 1979). Even assuming for the sake of argument that there was error, that error has been waived and certainly cannot be the basis for ordering a new trial. For the instant Trial Judge to have issued an order for a new trial, in the face of a clear failure to object, can be nothing but blatant error.

Respondent's attorney certainly gave every impression that he was withdrawing any prior objections that he may have had to the Trial Judge's answer to the jury's question and was, in fact, acceding to the Trial Judge's response to the jury's question.[1]

The Trial Judge is certainly abusing his discretion in basing an Order for a new trial on an issue not properly preserved for Appellate review.

Fed.R.Civ.P. 51 requires Counsel to make it abundantly clear to theTrial Court the objecting party's position. *Corriz vs. Naramjo*, 667 F.2d 892, 896 (10th Cir. 1982); *Barney vs. Staten Island Rapid Transit Railway*

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1. Following the Trial Judge's response to the jury's first question on proximate cause and after the jury returned to its deliberations, Respondent's attorney stated that the jury should "be instructed that no conduct on the part of Mr. Trapanese can play any part in their deliberations." (App. 18a). Critically, Respondent's attorney does not raise this point on day two of the jury deliberations in response to the jury's question on proximate cause. At that time, Respondent's attorney acceded to the trial Judge's response.

Co., 316 F.2d 38 (3rd Cir. 1963). The purpose of the Rule is clear:

> To prevent a litigant from taking advantage of an error which could be rectified by the Court if called to its attention by timely and specific objection.

Corriz, supra at 896.

Had Respondent's attorney made his objection clear, the Trial Court would have been afforded the opportunity to analyze the supposed error and rectify it if it were found to exist. The failure to do so means that the foundation for the trial court's opinion was not preserved for review and therefore can not serve as a basis for ordering a new trial.

Petitioner therefore contends that there was no error in the jury instructions or answers to the jury questions which would require or support the drastic remedy of an order for new trial. Furthermore, counsel failed to preserve any claim of error by objection or exception and when it has not thereby been preserved, the alleged error cannot serve as the basis for a new trial order.

III. THE PROPER DEVELOPMENT OF THE LAW OF MANDAMUS AND THE PROPER JUDICIAL ADMINISTRATION OF THE FEDERAL COURT SYSTEM REQUIRE SUPREME COURT INTERVENTION AND CONSIDERATION OF THE EXTENT TO WHICH THE CONCEPT OF "SUPERVISORY MANDAMUS", FIRST ADDRESSED IN LA BUY VS. HOWES LEATHER CO., MAY BE INVOKED TO OVERTURN DISCRETIONARY BUT "BLATANTLY WRONG" NEW TRIAL ORDERS AND THUS TO PREVENT "NEEDLESS RELITIGATION" AND TO PRESERVE THE INTEGRITY OF THE JURY SYSTEM

It is Petitioner's contention that this Court's most recent pronouncement concerning the use of the ex-

traordinary writ of mandamus to overturn new trial orders, set forth in *Allied Chemical Corp. vs. Daiflon, Inc.*, 449 U.S. 33 (1980), is inadequate in that it fails to consider its application in reviewing new trial orders which are "blatantly wrong", which cause needless retrials and which, in the final analysis, are an affront to the jury system. *Central Microfilm Service Corp. vs. Basic-Four Corp.*, 688 F.2d 1206, 1212 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 1191 (1983). By failing to discuss *La Buy vs. Howes Leather Co.*, 352 U.S. 249 (1957) and by failing to recognize the distinction between the traditional concept of mandamus, as set forth in *Will vs. United States*, 289 U.S. 90 (1967) and *Bankers Life and Casualty Co. vs. Holland*, 246 U.S. 379 (1953), and "supervisory mandamus", this Court has left the impression that the latter concept is no longer a viable one and that discretionary new trial orders simply may not be reviewed without awaiting appeal from final judgment. Unless this Court moves to acknowledge this distinction and to reaffirm the validity of *La Buy*, the Circuit Courts of Appeals will regard themselves as completely powerless to prevent the wasteful and unnecessary relitigation which follows "blatantly wrong" new trial orders. In view of the ever-growing volume of cases on the Federal Court dockets, and the overall scarcity of judicial resources, it is submitted that this sort of "supervisory control of the District Courts by the Courts of Appeals is necessary to the proper judicial administration in the federal system". 352 U.S. at 259-60. This controversy provides the appropriate vehicle within which this Court may direct the Circuit Courts of Appeals on this important question.

In *Allied Chemical Corporation v. Daiflon, Inc.*, 449 U.S. 33 (1980), the District Court set aside a large Plaintiff's verdict in an antitrust case and granted a new trial due to errors in certain evidentiary rulings and because the evidence did not support the amount of the jury award. The Tenth Circuit issued a writ of mandamus, di-

recting that the portion of the District Court's order granting a new trial be vacated. It based its conclusion on what it deemed to be the arbitrary and erroneous nature of the District Court's decision. This Court granted certiorari and, in *per curiam* opinion, reversed the Tenth Circuit's order granting the writ of mandamus.[2] In so doing, this Court decided "peremptorily and summarily", *Id.* at 191 (Blackmun, J., dissenting), the circumstances which justify a federal appellate court's issuance of a writ of mandamus to overturn a trial Court's order granting a new trial.[3] It is Petitioner's contention that these circumstances are not exhaustive and should be broadened to encompass the circumstances presented herein.

Petitioners respectfully submit that the rationale underlying this Court's extraordinarily restrictive attitude toward the issuance of mandamus to overturn a new trial order in *Allied Chemical* is not present here. In *Allied Chemical*, this court stressed that "[t]o overturn an order granting a new trial by way of mandamus indisputably undermines the policy against piecemeal appellate review". *Id.* at 36, 101 S.Ct. 188, 191. This policy is one of the important policies underlying the final judgment rule. "Finality is not served, however, by needless relitigation and it is proper to consider whether appellate

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2. Justices Stewart and Stevens took no part in the consideration or decision of the *Allied Chemical* case. Justice Blackmun dissented and was joined by Justice White.

3. In this regard, the Court in *Allied Chemical* stated, in pertinent part, that

> [o]nly exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy . . . In order to insure that the writ will issue only in extraordinary circumstances this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires . . . and that he satisfy the "burden of showing that the right to issuance of the writ is 'clear and indisputable' "

Id. at 35, 101 S.Ct. 188, 190. (citations omitted).

review is 'fundamental to further conduct of the case.' " *Central Microfilm Service Corp. v. Basic-Four Corp., supra.* at 1212 (quoting *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54 (1964)).

Moreover, it is submitted that the instant case falls within the class of cases vaguely referred to in footnote 3 of the Court's opinion in *Allied Chemical*,[4] and that this case provides a unique opportunity for the Court to elaborate upon the circumstances in which the use of mandamus — specifically "supervisory mandamus" — is appropriate to review discretionary orders by a trial court judge. Petitioners maintain that the proper development of the law requires that this important application of mandamus be given plenary consideration by the court.

That the guidelines set forth in *Allied Chemical* are inadequate to deal with the broad application of mandamus in all new trial situations is illustrated through an examination of the Eighth Circuit's decision in *Central Microfilm Service Corporation v. Basic-Four Corporation, supra.* In that case, the Trial Court, following a sec-

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4. Footnote 3 of *Allied Chemical* provides as follows:
Even if it be appropriate in certain circumstances to use mandamus to review a discretionary order by a trial court, the new trial order entered in this case would not appear to be a likely candidate. A trial judge is not required to enter supporting findings of facts and conclusions of law when granting a new trial motion. *See* Fed.Rule Civ.Proc. 52 (a). It cannot be contended with any certainty that the trial court in this case, when entering its oral order granting a new trial, intended to set forth each and every reason for its order. The trial court did note, however, that it had made errors in the admission of certain documentary evidence and that it felt the petitioners had not received a fair trial. Given that the Court of Appeals did not have a complete transcript of the proceedings before it, see n.1, *supra*, and that there could be other unarticulated bases for the new trial order, it would seem all but impossible for the Court of Appeals to hold as a matter of law that the trial court clearly abused its discretion in entering the new-trial order.
Id. at 191.

ond trial, ordered the Plaintiff to accept a remittitur or proceed to a third trial. The Eighth Circuit then granted Plaintiff's mandamus petition and directed that judgment be entered in the full amount of the jury verdict returned in the second trial. This Court denied certiorari. In rendering its decision, the Eighth Circuit set forth the applicable law as follows:

> Mandamus review generally is available only in extraordinary circumstances and such review of new trial orders in particular is "rarely" justified. *Allied Chemical Corporation v. Daiflon, Inc., supra.*, 449 U.S. at 36, 101 S.Ct. at 191. Because the right to mandamus must be "clear and indisputable," a district court's action generally must be "blatantly wrong" to justify mandamus relief; arguable error within the scope of trial court discretion is not a proper basis for mandamus. *Cf. Id.* at 35-36, 101 S.Ct. at 190-191; *General Motors Corp v. Lord*, 488 F.2d 1096, 1100 n. 2 (8th Cir. 1974). Other factors which bear on the appropriateness of mandamus review include the need to correct error which is likely to recur and to provide guidelines for the resolution of novel and important questions. *See Schlagenhauf v. Holder*, 379 U.S. 104, 111-112, 85 S.Ct. 234, 238-239, 13 L.Ed.2d 152 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 254-255, 258, 77 S.Ct. 309, 312-313, 314, 1 L.Ed.2d 290 (1957); *General Motors Corp. v. Lord, supra,* 488 F.2d at 1099. Perhaps the most fundamental concern is the avoidance of piecemeal litigation and disturbance of the orderly administration of the courts — key policies underlying the final judgment rule. *See Allied Chemical Corporation v. Daiflon, Inc., supra,* 449 U.S. at 36, 101 S.Ct. at 191. Finality is not served, however, by needless relitigation and it is proper to consider whether appellate review is "fundamental to further conduct of the case." *Gillespie v. United*

> *States Steel Corporation*, 379 U.S. 148, 152-154, 85 S.Ct. 308, 310-312, 13 L.Ed. 2d 199 (1964); *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179, 187 (8th Cir. 1972).

Id. at 1212.

As far as Petitioner's research reveals, the *Central Microfilm* case is the first instance in which a federal appellate court has emphasized the appropriateness of "supervisory mandamus" to address the "needless relitigation" which necessarily follows a "blatantly wrong" new trial order. In effect, the Eighth Circuit Court of Appeals has taken the lead in seeking to revive the concept of "supervisory mandamus", first discussed in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), which was completely and inexplicably ignored in the *Allied Chemical* decision.[5] In this era of excessively crowded lower court dockets, it most certainly is in the interest of the fair and prompt administration of justice for this Court to at least *consider* the possible application of "supervisory mandamus" to prevent needless retrials.

As suggested above, any examination of this important branch of the extraordinary writ of mandamus must begin with a review of the *La Buy* decision. In *La Buy*, this Court approved the Seventh Circuit's granting of a writ of mandamus to prevent a trial court's questionable practice of regularly referring antitrust cases for trial before a special master under Rule 53(b) of the Federal Rules of Civil Procedure. A commentator has described the significance of the *La Buy* decision as follows:

> By concluding that the practice in issue was only questionable — that the discretionary power under rule 53(b) was being used too often — and by

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5. This Court's failure to recognize the concept of "supervisory mandamus" in *Allied Chemical* is especially disturbing in that the Tenth Circuit's grant of mandamus in that case was based upon this very doctrine.

approving the writ as much to discourage the practice as to bar its use, the Court signalled an expansion of the mandamus power beyond traditional limits.

Although Justice Clark's majority opinion in *La Buy* pays lip service to the traditional standard by stating that Judge La Buy had abused his power, it is rather clear that in the traditional sense there was no abuse of power involved. The practice of the district court to which the writ was directed in *La Buy* was specifically authorized under rule 53 (b) as long as "some exceptional conditions [required] it," and determination of exceptional conditions was left to the trial judge. Thus, it could not be said that the district judge acted without or beyond his power in referring cases to a master. A judge always has power to enter an erroneous order.

Rather than being a usurpation of power case, *La Buy* is viewed by both courts and commentators as a precedent for expanded appellate court supervision of lower courts. The implication has arisen from *La Buy* that mandamus may be used to discourage an erroneous practice and prevent its recurrence, and in this context it is the likelihood of recurrence and the need to prevent it that are the critical factors, not the jurisdictional excess or usurpation of power which were determinative under the traditional standard. Hence, notwithstanding the actual absence of usurpation of power in the traditional sense, the Supreme Court approved the writ, stating:

> 'We believe that the supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Court of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here.'

Can the Federal Courts Keep Order in their Own House? Appellate Supervision through Mandamus and Orders of Judicial Council, 1980 B.Y.U. L. Rev. 233, 241 (1980) (footnotes omitted).

Clearly, the abuse of discretion which warranted the issuance of mandamus in *La Buy* is no more severe than that which has occurred in the instant case. Without question, Judge La Buy and Judge Pollak in the instant case, acted within their "power" under Rule 53(b) and Rule 59(d) respectively.[6] Furthermore, in this instance, as in *La Buy*, the likelihood of recurrence is great and the need to prevent such recurrence is paramount. Just as District Court judges cannot be permitted to routinely shirk their responsibility by referring difficult and time-consuming matters to special masters, despite having the "power" to do so, trial judges should not be permitted to order a new trial *sua sponte* based on nothing more than idle speculation as to what the jury might have been thinking in rendering its verdict. Not only is the jury system entitled to more protection than this, but the orderly and efficient administration of justice demands that "needless relitigation" be prevented. Our seriously overworked federal judicial system can no longer afford to shrug its shoulders at the baseless rulings of trial judges simply because the judge possesses the "power" to make such a ruling, when the result is to waste the valuable resources and energies of the Court, the bar and the litigants.

> The *La Buy* line of cases supports the exercise of "inherent powers of appellate jurisdiction to effectuate what seems to . . . be the manifest ends of justice," whether that jurisdiction is exercised to correct defiance of a higher court, delay of justice,

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6. It is Petitioner's contention that although Judge Pollak possessed the authority under Rule 59(d) to order a new trial on his own initiative, this authority was not exercised within the constraints set forth in Fed.R.Civ.P. 59(a) and 61.

> or judicial bias and whether the misconduct is isolated or recurrent. All these considerations are within the "vital corrective and didactic . . . aims [which] lay at the core of . . . [the] decision in *La Buy* and *Schlagenhauf v. Holder*, [379 U.S. 104 (1964)].

Id. at 247.

The case at bar provides the Court with an ideal opportunity to set forth the scope and the boundaries of the appellate courts' supervisory authority under the All Writs Act, a task which has not been undertaken since this Court's decision in *La Buy*. As another commentator has observed: "The task is to give a definition of that practice which explains both how it differs from traditional mandamus, and at the same time how it is kept from being a system of discretionary interlocutory review." Note, *Supervisory and Advisory Mandamus under the All Writs Act*, 86 Harv. L. Rev. 595, 608 (1973). In so doing, this Court will not only succeed in reviving a forgotten, yet viable, branch of the law of mandamus, but on a more practical level, will also have an opportunity to officially recognize and address the problem of "needless relitigation" and, hopefully, to preserve the integrity of the jury system.

CONCLUSION

If the decision of the Court of Appeals, in refusing to issue a Writ of Mandamus is permitted to stand, the decision will be seen as an open-ended invitation for new trial orders based on speculation into the thought processes of the jury, when no error was committed and when no error was certainly preserved. Reversal of the decision of the Court of Appeals will serve as appropriate precedent to bar needless relitigation.

Respectfully submitted,

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82-2051

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GIDDINGS & LEWIS MACHINE TOOL COMPANY,
Petitioner

v.

JOHN AND PATRICIA TRAPANESE,
Respondent

v.

HONORABLE LOUIS H. POLLAK,
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN TRAPANESE AND PATRICIA HANDO TRAPANESE, h/w	:	Civil Action
v.	:	
GIDDINGS AND LEWIS MACHINE TOOL COMPANY	:	No. 81-1161

MEMORANDUM/ORDER

1. In this strict liability case the jury started its deliberations on Thursday, December 23, resumed on Friday, December 24, and completed its work on Monday, December 27.

2. On the jury's first day of deliberations, it asked certain questions in writing. One of these questions was whether the alleged defect in the vertical boring mill manufactured by defendant had to be "the primary or the most probable cause of the accident, or was it only necessary to feel that it contributed to the accident."

3. In response to that question, I reread to the jury the portion of the charge dealing with proximate cause. According to that instruction, the jury was advised that the alleged defect did not need to be the only cause "but had to be a substantial, discernible" cause. I denied the request of plaintiffs' counsel that I instruct the jury that any negligence on the part of plaintiff John Trapanese was not to be considered by them. I reasoned, as I explained to counsel, that because in a strict liability context I had not included any material on comparative or contributory negligence in my charge, I thought it inappropriate to introduce such concepts to the jury at this point in its deliberations, especially since it could conceivably be taken as a prod to resolve the issue of causation in plaintiffs' favor.

4. On the second day of its deliberations, the jury asked for "a restatement of the answer to our second question yesterday. . . ."

5. This time, in responding to the jury, I prefaced my rereading of the proximate cause instruction with the direct answer "no" to the question whether the alleged defect had to be "the primary cause or the most probable cause of the accident." Once again, I declined to instruct the jury that it should disregard any perceived negligence on the part of John Trapanese.

6. On Monday afternoon, December 27, the jury returned a verdict for the defendant. Pursuant to that verdict, judgment has been entered in favor of the defendant and against the plaintiffs.

7. Since the return of the verdict, I have been giving further thought to the jury's questions and my responses thereto. I have come to the conclusion that on December 24 when the jury, for a second time, asked about causation I should have explained the non-relevance of John Trapanese's conduct. If the jury was concerned with Mr. Trapanese's conduct, such an instruction, properly couched, would presumably have guided the jury back to its proper course. If the jury was not concerned with Mr. Trapanese's conduct, the instruction, properly couched, would have been a harmless superfluity.

8. Having come to the conclusion that on December 24 I should have responded more fully than I did to the jury's reiterated question about causation, I have determined, on my own motion, to set the jury's verdict aside and direct a new trial.

9. WHEREFORE,. pursuant to Rule 59(d) of the Federal Rules of Civil Procedure, I hereby DIRECT that the judgment entered on December 28, 1982 be vacated and I ORDER and DIRECT that a new trial be had.

JANUARY 4, 1982 POLLAK, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3098

GIDDINGS & LEWIS MACHINE TOOL COMPANY,
Petitioner

v.

HONORABLE LOUIS H. POLLAK,
Respondent

v.

JOHN AND PATRICIA TRAPANESE

Present: WEIS, GARTH* and BECKER, *Circuit Judges.*

ORDER

After consideration of the Petition for Writ of Mandamus and the Answer filed by John and Patricia Trapanese, it is

ORDERED that the Petition for Writ of Mandamus is denied.

By the Court,

Circuit Judge

DATED: March 24, 1983

* Judge Garth was a member of the panel to which this matter was originally submitted. He became ill and did not participate in the final decision.

* * *

THE COURT: All right, I will then ask counsel to come to side bar for a second.

(Side bar discussion on the record, as follows:)

THE COURT: You can tell me now where I have slipped up if there are things other than what we have already had discussions about and rulings on.

MR. SCHWARTZ: Your Honor, I take no issue with the charge as given. Some of the plaintiffs' requested points were not given, but I assume that it's the Court's position they are in fact covered.

THE COURT: That is my belief, yes.

MR. POST: I do the same thing, your Honor. There is one little problem, and I don't even know whether I want you to say it to the jury — the $32,000 item did include overtime.

THE COURT: It did?

MR. POST: Yes. I won't even make an issue of it, sir.

THE COURT: That was a —

MR. SCHWARTZ: That's not your fault, sir, because there was a change made and nobody brought it to your attention. If counsel wants it to be corrected, I don't object.

THE COURT: I'd be glad to do that. That's funny, as I was reading it I was wondering about it.

MR. SCHWARTZ: Counsel is correct on that point.

MR. POST: Okay, would you please, sir?

THE COURT: Sure.

(End of side bar discussion.)

THE COURT: There is one matter which I should correct.

I was quite in error on one matter that goes to the amount of damages that have been proved with respect to past lost earnings.

You may remember Mr. Schwartz and I had our discussion of whether the earnings period went from '79 to '80 or '81, and it went to 1980, and the figure in question that I gave you was $32,000 based on average weekly earnings of $500 for that period of approximately a year-and-a-quarter. All that is well and good. The error came in my telling you immediately thereafter that this figure of $32,000 does not include overtime and fringe benefits. That was almost right, but the right sentence would have been this figure does include overtime and fringe benefits. $32,000 is a comprehensive figure that includes the entirety of lost earnings to date.

I think that will correct it.

MR. SCHWARTZ: May we see you at side bar for one moment? Because I did have a question and neglected to bring it to your Honor's attention.

THE COURT: All right.

My friends, you may retire now to a well-deserved lunch which I envy you, and go to work. And if I hear nothing from you earlier than 5 o'clock, I will ask you to come in at that time and tell me whether you want to continue further this afternoon or not. And I won't put myself completely in your hands, but I will be largely guided by your judgment on that. So go to it.

(The jury retired at 1:45 p.m.)

(The following transpired in open court, out of the presence of the jury:)

THE COURT: You folks will let us know if you are somewhere not in your offices?

MR. POST: Fine, sir.

MR. SCHWARTZ: We have agreed we are going to get a bite to eat and stay around the courthouse, because it's going to be about a quarter to three by then. Your Honor it going to need us by five.

MR. POST: Two brief points: Number one was as I mentioned earlier, I am not positive our written points for charge included a motion for a directed verdict. In the remote event it doesn't, I do make that motion, and I did make it at the appropriate time, and I put it on the record now.

THE COURT: Right. That motion will be denied.

MR. POST: I'm sorry, I should have let you rule, sir.

Second, I would like to have this marked, this special damage exhibit that was used by Mr. Schwartz, which was the subject of much discussion, marked as a Court Exhibit or D-3, or whatever your Honor wishes, so we can preserve it for the record, sir.

THE COURT: All right.

MR. POST: Thank you.

THE COURT: Call it D-3.

MR. POST: I move for the admission of that for that limited purpose.

THE COURT: Fine. It will be so admitted.

(Recess taken at 1:50 p.m.)

(The following transpired in open court, out of the presence of the jury:)

THE COURT: Folks, we have a message from the jury which is in its entirety as follows:

"May we have a copy of the six points needed to identify liability?"

I would ask counsel what their advice is. Really, I can easily read the six points. I have some question about whether they should be handed to the jury. I guess there is also a question just reading the six points without at least a little putting in context is appropriate, but let me hear what you have to say.

MR. POST: I will be happy to go first, if you want me to, Alan?

MR. SCHWARTZ: Go ahead.

MR. POST: I think the jury has asked for a copy. Is that the word?

THE COURT: That's right — "May we have a copy of the six points needed to identify liability?"

MR. POST: As far as I'm concerned, your Honor, I would just as soon have the six points listed in a copy that they can take back and use to refresh their recollection as to your Honor's charge, as briefly as possible.

MR. SCHWARTZ: I think, your Honor, I have to opt for the Judge giving them the six points, reading the six points with the explanation, because if you give them the six points, three are admitted. The fifth point needs a little explanation, because the fifth point refers to substantial change. So if you just give them the six points, I don't think they'd make any sense at all without some explanation by the Court.

THE COURT: Well, I can give to the jury the six points with the addition to five, five you remember being if a defective condition existed at the time when the

product was sold — I can add that the Court has ruled that the boring mill was in substantially the same condition in 1979, the date of the accident, as it was in 1953, when the mill was sold, and with respect to three, which was the product was without substantial change from the condition it was in at the time of sale, the full statement of that as I gave it was, i.e., that it was in essentially the same condition.

Now, if you are satisfied with my giving them that in writing, as well as reading it to them, Mr. Post and Mr. Schwartz, I'd be perfectly glad to do that.

MR. POST: I would not be satisfied, sir. I think my request would be to comply with the jury's request for a copy of those six points, or, in the alternative, have your Honor read the entire charge over again in reference to those six points, rather than give any undue weight to any of those points in anything that you might send out to the jury.

THE COURT: Well, the six points, as I gave them, contained, well, as I read three, it had added to it the equivalence of essentially the same condition to substantial change, an in giving five I elaborated, as you will remember, on equivalence between the 1979 and 1953 conditions. So it is not a matter of changing the conditions, changing the six points, but it would mean if I gave them those in writing, I think I would feel obliged to be sure that the points given to the jury contained those qualifications, although, if you think I shouldn't do that, I will re-read the portion on liability.

MR. SCHWARTZ: I have no objection to that, your Honor.

THE COURT: All right, that's what I'll do.

MR. POST: May I have a moment for reflection, sir?

Again, so I understand what your Honor would do if it were done in writing, you would list the six points in brevity and then you would say as far as points — may I ask you to repeat, sir? I apologize.

THE COURT: The way it would come out would be this: Here are the six elements the plaintiffs must prove:

1. That the defendant sold or manufactured the product which allegedly caused the accident;

2. That the defendant is in the business of selling or manufacturing the product;

3. That the product at the time of the accident was without substantial change from the condition it was in at the time of the sale, i.e., that it was in essentially the same condition both times;

4. That the product contained a defective condition;

5. That the defective condition existed at the time when the product was sold.

Here I charged the jury that I have ruled that the boring mill was in substantially the same condition in 1979, the date of the accident, as it was in 1953, when the boring mill was sold.

6. That the defective condition was a proximate cause of the injury that Mr. Trapanese sustained.

MR. WRIGHT: I would agree to that worded just that way.

MR. SCHWARTZ: I think, your Honor, you did indicate one, two and three had in fact either been admitted or — is that correct?

THE COURT: Of course, I did say that in my instructions, and it was not recapitulated in what I just gave you. I think if you are making that point, Mr. Schwartz, I think it would be proper, indeed, pretty much obligatory for me to give that, too, to the jury.

MR. SCHWARTZ: Yes, sir.

THE COURT: That if they are to take the six elements in writing, I think they must be reminded that the first three of those are either not disputed or I have in effect ruled on them.

MR. POST: Would you indicate that the first two are stipulated to and the third one has been ruled upon by the Court, which is the fact, sir?

THE COURT: Surely.

MR. POST: Okay. Fine, sir. I'll agree to that.

THE COURT: So it is agreed that I should give that in writing to them?

MR. POST: Yes, sir.

THE COURT: All right.

MR. SCHWARTZ: Will we get a copy of that, your Honor?

THE COURT: Sure. I will go back and prepare it right now.

(A short recess was taken.)

(The following transpired in open court at 5:55 p.m., out of the presence of the jury:)

THE COURT: Hello again. We have two more communications from the jury. The first says at the top, "Element No. 4." And then it says, "No. 1. Are we to consider only the run and jog buttons in our consideration of the defective condition, or may we consider other parts, i.e., other buttons?"

Let me read you the second. It says, "Element No. 6. No. 2."

MR. POST: I'm sorry, 6-2?

THE COURT: Element No. 6. What comes under the caption "Element No. 6" is paragraph labeled "2," the numbering, I'm sure, being that their first communication was No. 1 under Element No. 4. This is now No. 2 under Element No. 6.

"Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the accident, or is it only necessary to feel that it contributed to the accident?"

Now, the second of those questions I think is met simply by re-reading to the jury what I said about the sixth element, which is about proximate cause. I remind you that what I said was this: "The sixth and final element in strict liability is proximate cause. The plaintiff must prove not only that the unguarded buttons on the control station constituted a defect, but also that the defect was a proximate cause of the injuries suffered by Mr. Trapanese. An event or injury is proximately caused by an act of failure to act — in this case defendant's sale of its product in an allegedly defective condition — whenever it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury. The act or omission need not be the only cause of the injury, but it must be a substantial, discernible cause. The fact that some other factor may have caused the injury does not relieve the defendant of liability unless you find that such other cause would have produced the injury independently of defendant's alleged act or omission."

Now, I think that is reasonably responsive to the second question.

As to the first:

"Are we to consider only the run and jog buttons in our consideration of the defective condition, or may we consider other parts, i.e., other buttons?" I think what I would — my own view would be to tell them they are not to consider the gear switch because that has been ruled out of the case.

I'd be glad to know whether you gentlemen have other notions as to what I should say to them?

MR. SCHWARTZ: Your Honor, I think I would agree with that, plus the testimony was that buttons should be guarded, all except the stop button, which should be available under all circumstances. So I guess it would include that you don't guard a stop button because you want to be able to hit that any time, and I

guess the testimony was you guard all bottons but in particular jog and run.

MR. POST: Would you mind reading that question again exactly, sir?

THE COURT: The question is:

"Are we to consider only the —" this is with respect to Element No. 4, I mean that's how they label it — that the boring mill contained a defective condition:

"Are we to consider on the run and jog buttons in our consideration of the defective condition, or may we consider other parts, i.e., other buttons?"

MR. POST: I think the direct answer to that would be only run and jog.

It seems to me what they are getting at, sir, is that gear shift, and the implication is that because that was not working properly they are going to consider pinning that on the manufacturer, and for that reason — well, my statement would be that the plaintiffs' contention from the very beginning of this case, through all discovery and through the trial, has been the contact with the run and jog button. Anything else is beyond the scope of their contentions in this case, sir.

MR. SCHWARTZ: I disagree, your Honor. Our testimony was that the pendant control station should be guarded, particularly the run and stop buttons, and you don't guard — I'm sorry, the run and jog buttons. You don't guard the stop button. That was the testimony in this particular case. Plus, your Honor, defendant's own expert testified that it was his impression that the plaintiff might have accidentally hit the rail down button. So that's imported with the theory that the plaintiff — plus the facts to it were supplied by defense counsel — I'm sorry — by defense witness —

MR. POST: If your Honor please, your Honor has taken the defense of substantial change away from defendants for the reasons your Honor has already indicated, but you see what has happened here. We have the other side of the coin, that because you have taken that

defense away they are making some assumptions that because that switch was not working at the time of the accident, and because the machinery was in the same condition at the time of the accident per your ruling as of the time of the manufacture, they are now thinking in terms of finding my client liable because of that switch, which has nothing to do with this case.

MR. SCHWARTZ: Your Honor, if I might just add one thing — I don't want to belabor the point — the gear shift switch only applies, according to the defendant's manual, to the run and jog buttons. It has nothing to do with the other buttons. It sets up the table, according to their very manual, so that if it is in the run position or normal position, the depression of the run button will not occur but the jog button will.

I am sorry, I got that backward. If you keep it in the normal gear position, you can accidentally hit either one and they will both move. If you put the gear mechanism into the gear shift mode, the run button will not move if you hit it, but the jog button will, and that's what the manual says. So when counsel says that that has anything to do with the other buttons, he is mistaken, and if he gets his manual out the Court can see that.

THE COURT: I'm not really terribly eager to look at manuals at this point. I don't think any of us is. You may remember that I characterized the plaintiffs' case in the instructions, and I think that characterization may be useful again.

What I said was, "The plaintiffs contend that the defendant's boring mill was defective because the buttons — and in particular the run and jog buttons — on the pendant control station were unguarded. They have argued that the unguarded buttons on the operating mechanism made the machine unsafe for its intended use."

Now, it seems to me I can re-read to the jury those two sentences and add that the jury is instructed to disregard the gear switch.

MR. POST: I would ask "disregard anything other than those two buttons," sir, because that has been the entire plaintiffs' case, those two buttons. Plaintiff's contention is he struck one of those two buttons. All the discovery, all the evidence, the whole plaintiffs' case and the whole defense has been geared to those two buttons.

THE COURT: Well —

MR. POST: You see, there are additional problems I just want to call to your Honor's attention, because the issues about the hole in the buttons — for all we know, the missing button might now be attributed to Giddings and Lewis, because your Honor has instructed there was no change from the time of '52 or '53 to '79, and any chance that that jury is thinking along those lines, your Honor, I respectfully say creates a grave injustice here, because of your Honor's ruling.

MR. SCHWARTZ: Your Honor, in response to that, I have no objection if the Court indicates to the jury that we don't deny that you had to guard the button that wasn't there, either, the missing button, if that's his concern, but again, our case is unguarded buttons and that is the defective condition, unguarded buttons, in particular, those two, but the jury has a right to decide in the face of the plaintiffs' evidence and the defense evidence that they may have a right to decide other buttons have something to do with this case.

MR. POST: May I ask —

THE COURT: What other buttons could they connect this case with?

MR. SCHWARTZ: The rail, based on the testimony of Dr. Sander, who said simply that he didn't believe that Mr. Trapanese intentionally hit the rail button.

THE COURT: Well, I have already ruled that out. No, I don't think a verdict could be sustained on any basis other than the run and jog buttons, so, I think I will answer the jury that they are to confine their attention to the run and jog buttons.

All, right, I think that is proper.

(The jury returned at 6:05 p.m., all parties being present.)

THE COURT: My friends, it's good to see you again. I asked you to come in, to respond to your most recent communication.

Is it Mr. Motter? You are the elected spokesperson of the group?

JUROR NO. 3: The lucky one, yes.

THE COURT: You have sent me two questions, and I will take them in sequence.

The first, which is identified as relating to Element No. 4, asks this: "Are we to consider only the run and jog buttons in our consideration of a defective condition, or may we consider other parts, i.e., other buttons?

And my instruction to you is to consider only the run and jog buttons.

Now, the second question, which is designated as relating to Element No. 6, says as follows:

Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the accident, or is it only necessary to feel that it contributed to the accident?"

Now, in that connection, I will read to you once again what I charged you with respect to the sixth element. I will read it twice so that you can get it.

"The sixth and final element in strict liability is proximate cause."

Let me start by reading to you what element number six is, because you don't all have it in front of you:

> "That the defective condition was a proximate cause of the injury that Mr. Trapanese sustained."
>
> "The sixth and final element in strict liability is proximate cause. The plaintiff must prove not only that the unguarded buttons on the control station constituted a defect, but also that the defect was a

proximate cause of the injuries suffered by Mr. Trapanese. An event or injury is proximately caused by an act or failure to act — in this case defendant's sale of its product in an allegedly defective condition — whenever it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury. The act or omission need not be the only cause of the injury, but it must be a substantial, discernible cause. The fact that some other factor may have caused the injury does not relieve the defendant of liability unless you find that such other cause would have produced the injury independently of defendant's alleged act or omission."

Now, I will read it to you again.

"The plaintiffs must prove not only that the unguarded buttons on the control station constituted a defect, but also that the defect was a proximate cause of the injuries suffered by Mr. Trapanese. An event or injury is proximately caused by an act or failure to act — in this case defendant's sale of its product in an allegedly defective condition — whenever it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury. The act or omission need not be the only cause of the injury, but is must be a substantial, discernible cause. The fact that some other factor may have caused the injury does not relieve the defendant of liability unless you find that such other cause would have produced the injury independently of defendant's alleged act or omission."

So that completes my two responses to your two questions, and I know this is a later hour, but I'm happy to wait and continue if you wish to go back and continue your deliberations.

If your folks decide that you want to recess now and come back tomorrow morning, I will be guided by your judgment.

Maybe you'd like to go back and talk among yourselves to determine whether you wish to continue now or recess.

JUROR NO. 3: We had agreed ahead of time, because some people had to make certain connections, if we had not reached agreement by about a quarter after six we would have to come back tomorrow, and it appears that we reached it.

THE COURT: All right. Then I will ask you to come back tomorrow morning at 11 o'clock. I hope you won't mind taking a little longer to wake up in the morning. I'll see you tomorrow morning at 11 o'clock, and we will recess now, and thank you for your hard work, and we will have some more hard work tomorrow.

(Whereupon, the jury retired at 6:10 p.m.)

(The following transpired in open court, out of the presence of the jury:)

MR. SCHWARTZ: Your Honor, I have a distinct impression that what is going through the minds of the jurors here is the conduct on the part of Mr. Trapanese as being one of the things that they are considering in light of the arguemnt —

THE COURT: Excuse me, before we go any further.

(Discussion off the record.)

MR. POST: Mr. Schwartz is going to say something on the merits. I was wondering whether your Honor would think about the suggestion of instead of tomorrow, Monday morning, before the jurors leave.

THE COURT: Well, I think that's a long way to put them off. If counsel were united in that recommendation, I would entertain it, but I'd be kind of skeptical about it.

MR. SCHWARTZ: No, sir. No, I don't believe that's a good idea, your Honor. I think a three-day hiatus would leave them too far away from the facts and the arguments to put everything in proper context, especially since they are apparently down now to question number six.

Your Honor, I have a feeling that this jury is now in its deliberations on proximate cause, weighing the conduct of Mr. Trapanese in relationship to the operation of the machine, particularly in connection with certain arguments made by counsel concerning Mr. Trapanese's positioning the pendant station. We had asked for a charge that contributory negligence is not a defense to this case, as was assumption of risk. We still don't believe assumption of risk is necessarily at issue, but I believe it is important, since the jury is now talking about conduct, what caused this, that the jury be instructed that no conduct on the part of Mr. Trapanese can play any part in their deliberations, because contributory negligence or any conduct on his part is not a defense to a strict liability lawsuit. Counsel interjected this during the trial, your Honor. You are aware I objected to it because I said contributory negligence is not a defense. He argued that point tangentially in his summation and we asked for a point for charge on it.

THE COURT: Well, I would be quite troubled about introducing a new point for charge at this time, especially one would seem so programmatically geared to saying, "Don't go down a particular line which somebody is worried you may be on."

I think the charge as we gave it was a coherent whole which focused the jury's attention on the elements which if proved would entitle the plaintiff to a determination of liability, and I think they should know from the answer which they have received to their question about proximate cause the proper theories to proceed on.

MR. SCHWARTZ: Your Honor, I think the charge is less open in the minds of the jurors that possibly the conduct of Mr. Trapanese could be a substantial factor in bringing it about, i.e., positioning the pendant station so that he hits it or that he in fact might have hit it in some other fashion. In other words, I think what it's done is it's left the jury open to consider his conduct as being a substantial factor in bringing about the happening of the accident, when such would not be a defense to a 402(a) case, especially in light of the arguments made by defense counsel and the evidence that he put on this record about the twisting, if your Honor recalls, the twisting of the buttons, so that it faces the machine as opposed to facing away from the machine, where the plaintiff positioned the specific pendant station. Counsel said that he was there to establish it in terms of how the accident happened, and for that reason the Court let it in, but now the jury is talking about was his conduct, or thinking about, and it's open to them to think about whether his positioning was a substantial factor in bringing about this accident.

THE COURT: Well, I have been monopolizing the conversation. Mr. Post, you may want to participate.

MR. POST: If your Honor please, I don't recall ever bringing in any evidence of the type Mr. Schwartz indicated. I do not recall arguing anything of the type that Mr. Schwartz indicated.

Your Honor made a charge, the first charge I have heard of in many years of trying cases, where both attorneys had not exceptions. That charge was agreed to by both attorneys as being fair and reasonable in expressing the law, and at this point to add new elements and to emphasize new elements would be entirely inappropriate, untimely, and I would object very strenuously, sir.

MR. SCHWARTZ: Your Honor, I agree to that point, but when the jury comes in with a question, and that question leaves open the fact that they are consider-

ing a defense, or the possibility that they may be considering a defense which under the law is not a defense, I see it as the obligation of the Court to instruct them that they are not to consider any conduct on the part of Mr. Trapanese as being a substantial factor, because that would go to a defense they are not entitled to have.

I am not taking away the charge as given; it's correct. But the jury here must be considering, based on what we have in the way the case has developed, must be considering his conduct.

MR. POST: That's funny, I read it just the opposite, sir — just a guess on what they are considering. I read just the opposite as to what they are considering. It never even dawned on me —

MR. SCHWARTZ: Even if it's a guess, it may be something going through their mind. The charge that it's not an element in the case cannot be error, because it is the law of the Commonwealth of Pennsylvania that it is not a defense, so it can't be wrong to do it, and it may clear up confusion.

THE COURT: I appreciate that it can't be wrong in the sense that it wouldn't be a misstatement of the law, but I think the injection of such a new line of legal discussion at this time is so likely to have a kind of coercive effect on the jury's thinking as to be read by them as an impulsion from the Court to decide this case in favor of the plaintiffs on the liability side, I think the risk of that is so substantial, Mr. Schwartz, that I think that would be a wrong thing to do. I am not arguing that had the charge contained such an injunction about the nonrelevance of contributory or comparative negligence that the charge would have been erroneous in some reversible-error sense. I thought it would have been a mistake, and for that reason declined so to instruct the jury, as I would not instruct the jury on lots of matters which are not in my judgment pertinent to the statement of these are the claims that are to be made and these are the appropriate defenses, but although I would not have

regarded it as reversible error, I can put myself in the position presumably of somebody who would have to review such a charge to have included an analysis of the kind that you would urge; I thought it the better part of prudence not to include anything of the sort, and now to do so, unvarnished as a new injection not in the context of a whole large reorganization of a whole conceptual framework would seem to me a wrong thing to do, a form of judicial intervention in the jury's processes that I don't think I am authorized to pursue.

MR. SCHWARTZ: Your Honor, I was under the impression, your Honor, that it would be almost obligatory on the Court when the jury poses a question which has built into it the possibility that they may well be considering the defense to a suit which is not a defense, that it should be done. Now, your Honor has a valid point of taking it totally out of context, so I would suggest, your Honor, you read back exactly what you have read, but simply adding the sentence that this would not apply to any conduct on the part of plaintiff as a substantial factor, and just read it again, read it without any contributory negligence, just add in a little sentence as you read it back to them, and it will be an instruction to them but not out of context, so that the jury doesn't think that anything Mr. Trapanese did, i.e., mispositioning the pendant station, swinging it, getting off without looking, are substantial factors in bringing about this accident.

THE COURT: Well, Mr. Schwartz, I think I understand your position, but I am afraid I respectfully disagree, so I am going to leave the charge as it is.

Now, tomorrow morning, I will come back at eleven. I don't see any need for you folks to be here at 11 o'clock. It's going to be a formal recommitting them to work, which I can do unaided.

Obviously, you are welcome to be present if you wish to be, but I would only say that I would think everybody ought to do the same thing. I don't think the courtroom should have counsel for one side here, or Mr.

Trapanese here with counsel, and nobody for the defendant, or vice-versa. That would seem to me wrong. If the jury comes in and finds nobody here except me, I'll tell them that you haven't disappeared, but you will be readily available when there is something substantial, but that I urged you not to come simply to observe the jury being recommitted to work.

MR. POST: Shall we leave our numbers, sir? I'll be in the office. I can be over in two minutes with a call.

THE COURT: Will you both be at your offices?

MR. SCHWARTZ: No, your Honor, we would be here, because we are a substantial distance away and have a parking problem. My lot is some distance. I'm all the way up at 19th and Delancy, so that—

MR. POST: You can spend your time in my office.

THE COURT: Well, if you want to be here in the courtroom, then I guess I have to ask Mr. Post or—

MR. SCHWARTZ: Why should he be making a living while I'm not?

THE COURT: Mr. Post or Mr. Wright, or some appearance on defense side.

All right, see you at 11 o'clock tomorrow.

(ADJOURNMENT AT 6:30 P.M.)

(The jury returned at 2:55 p.m., all parties being present.)

THE COURT: Well, my friends, you have been working away for quite a while, and I called you in because I wanted to inquire whether you have a view about whether you want to continue on further this afternoon or would like to recess for the weekend and resume Monday morning. I am prepared to follow your advice on

that. This is not an endurance contest, and there is no reason for you to feel coerced; indeed, there is every reason for you not to feel coerced about reaching decisions before you are prepared comfortably to reach them, and we can perfectly easily accommodate ourselves to your preferences.

Maybe you would like to go out and chat among yourselves for a couple of minutes and then come back and tell me how you would like to proceed. Okay?

JUROR NO. 3: Yes.

THE COURT: All right, we'll wait for you.

(The jury retired at 2:58 p.m.)

(The jury returned at 3:15 p.m., all parties being present.)

JUROR NO. 3: We have a request. What we would like is to have a restatement of the answer to our second question yesterday on Element 6, and then the possibility of going back into deliberation for a short time, at least, and if at that point we cannot reach an decision, to break until Monday.

THE COURT: All right.

JUROR NO. 3: Any additional clarification on that would be helpful.

THE COURT: All right. Fine. I'll ask you, if you will, to go back to your room for a moment, and I want to talk with counsel about it, and then I'll call you back in.

(The jury retired at 3:16 p.m.)

(The following transpired in open court, out of the presence of the jury.)

THE COURT: You will remember that the second question I put, the one that I take it they are referring to, the one that's geared to Element No. 6, the question was in the form: "Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the accident, or is it only necessary to feel that it contributed to the accident?"

And what I did by way of response was to read the material on proximate cause in the instruction.

It occurred to me sometime late yesterday evening that though the answer, reading them the proximate cause material again was, I think, appropriate, it was less directly responsive to the question than I think could easily be done, and it seems to me that what I should do is say, "No, it is not necessary to feel that the defective condition was the primary cause, so long as it was a substantial contributing cause," and with that answer, then go ahead and re-read to them the language on proximate cause.

MR. POST: May I, your Honor?

THE COURT: Yes.

MR. POST: I would object, your Honor, and I would object to even reading the law again.

You have already told this jury what the law in Pennsylvania is in reference to proximate cause, on three occasions, and I think that any further amplification at this late stage is inappropriate, and I would object as strenuously as I could. I do not think, your Honor, with due respect to your opinion, sir, that answering that way, as you have suggested, is the law of Pennsylvania, and for the other reason, and more important reason, that you have told them the law of Pennsylvania on three occasions, and they have been deliberating now for two days, and to emphasize and give any additional explanation on that point now would give undue weight to the additional element that you are now proposing to give.

THE COURT: You are not saying, Mr. Post, or are you — are you saying that under the law of Pennsylvania the defective condition must be the primary cause?

MR. POST: No, I'm not saying that, sir. I am saying it has to be a substantial cause, sir, and the word in any other way than what the case law and what the law tells us is law in Pennsylvania is to give undue influence and weight to that other way.

THE COURT: But this is, it would appear from the statement of the question, the first time, and it's now repetition, that the jury perceives a distinction between primary and something less than primary that I think does credit to the sophistication of the jury. I think the language on proximate cause in the charge which they have now heard twice —

MR. POST: Three times, sir.

THE COURT: Three times? Well, all right, three times, I guess that's right. I think it is pretty good language, but it is apparent that they would welcome clarification if it can be provided, but in any event, it's language out of which one could extract the answer to the question they put, but it's aside, if you will. It is not as directly responsive as to say, "No, it is not necessary that it be primary."

MR. POST: My difficulty with the proposition, it seems to me, is what do they mean or what does anybody mean by primary? They might be back there thinking that, "Gee, if the Judge tells us this, we might think that the rail caused 95 percent of this accident and maybe 5 percent had to do with the buttons, and this primary, and this is secondary, and what does that mean?

It seems to me that is not consistent with the law in Pennsylvania, sir.

THE COURT: All right. What is your feeling, Mr. Schwartz?

MR. SCHWARTZ: Well, I agree, your Honor, that this is proper for you to say, "No, it does not have to be the primary."

I think the jury is inviting your Honor to discuss with them the issue of whether or not the plaintiff's conduct can have anything to do with the occurrence in the proximate cause sense because primary, as I understand it, means first in time element.

I assume what they are talking about is the primary incident would have been the plaintiff backing into it. I think again we are back to the issue that the jury is hung up on the plaintiff's conduct as it relates to proximate cause, and based on the *Berkabile* decision, the Court has, as I see it, the obligation to tell the jury that the plaintiff's conduct can play no part in determining the liability because his acts do not relate to any defense in this case, and I think that's what their hang-up is, and that is why I indicated that that has to be clarified, because in terms of sequence, the first thing that would happen would be the plaintiff backed up and hit a button. That would be the prime sequence of events.

MR. POST: That's just the danger with the use of terminology like "primary and secondary," is that it is conceivable that what Mr. Schwartz is saying might have some validity as to what came first and what came second. That's why I think "primary and secondary" really has nothing to do, or I respectfully suggest should not be what the jury is told in response to this question.

I also find fault with Mr. Schwartz' analysis, because my analysis is completely different as to what the problem is. I am absolutely convinced, for whatever it is worth to you, sir, that they heard those witnesses talk about those switches and those missing buttons, and that is what they are talking about, and it's clear to me that is what they are talking about when they are asking the question about whether or not the defect can be elsewhere other than the stop and jog buttons. That were talking about other parts of the machinery.

MR. SCHWARTZ: If Mr. Post's conjecture is right, then the Court's enlightenment on this point cannot prejudice the jury at all on that point, because it would

not relate, but if this is the point that is the logjam, it may very well break up the logs by charging what in fact is the proper charge, and that is the plaintiff's conduct has not application in this case.

THE COURT: Mr. Schwartz, of course we are all speculating. I tend to think that you are wrong in your speculation that primary means to the jury first in time, because the form of their question, if you remember, was, "Is it necessary to feel the defective condition was the primary cause or the most probable cause of the accident, or is only necessary," and so forth.

I read their question as one which equates primariness and probability, and I remain of the view that it would not be appropriate for me now to volunteer to postulate about contributory negligence. Had the jury asked, that would be something else again.

Mr. SCHWARTZ: Your Honor, we requested plaintiffs' additional point — plaintiffs' additional supplemental point for charge, direct evidence of the manner in which the alleged defect caused plaintiff's injuries is not required in a strict liability case. The plaintiff's burden of proving by a preponderance of the evidence that his injury was caused by the alleged defect, unguarded button, can be met by elimination of other reasonable explainable causes, and the cases are cited herein. This again, your Honor, would be under Pennsylvania law, I believe the original had already been given up. It may very well solve that problem after your Honor answers their question, since it answers their question.

THE COURT: Well, I don't really think those cases are apposite, Mr. Schwartz, which is why I didn't give that instruction. This isn't, I think a res ipso loquitur case.

MR. POST: May I say something, your Honor, sir?

THE COURT: Surely.

MR. POST: It has been a lot of hours that the jury has been deliberating. I am sure that we are all anxious to try to protect to this record, and I respectfully say un-

der the circumstances maybe the best thing to do would be have this jury come back on Monday moring and let them deliberate for a half hour or so and see as of that time, when they are refreshed and they have had a chance to deliberate a little further, whether they need any further instructions on this point, sir.

THE COURT: No, I am not going to do that to the jury.

MR. POST: Okay.

THE COURT: I think it's quite disrespectful. They have asked a question, and I think they are entitled to an answer, and they have asked the question before. I have answered it once. It would seem that they would like more if it can be provided, and with all due respect to your respective views, I think the answer that I propose would seem to me one which addresses their question and will, I hope, be helpful to them. It would go farther than you would like, Mr. Post, and not as far as you, Mr. Schwartz, would like, and so I guess I find myself in the usual position of respectfully disagreeing with you both. Perhaps that is what courts are for.

MR. POST: May I have just a moment to look at Mr. Schwartz' point here?

THE COURT: Sure.

MR. POST: May I have just a moment to think about it, sir?

THE COURT: Surely.

MR. POST: Your Honor, I'd be more inclined to have to agree with Mr. Schwartz and ask your Honor to give the charge that he has requested rather than the explanation that your Honor has just proposed. The reason for that, sir, is — I shouldn't say any more than say that.

THE COURT: Well —

MR. SCHWARTZ: Your Honor, my request was to answer the question as you had, and rather than reiterate what you had read earlier, which apparently has not enlightened them, to give them this additional point of

enlightenment. I didn't indicate to the Court that the Court should not be responsive to their question.

MR. POST: Then I misunderstood what Mr. Schwartz said.

THE COURT: You would like me to substitute that for what I propose to do?

MR. POST: Yes, sir.

THE COURT: You wouldn't want me to add to it.

MR. POST: That's right, sir.

THE COURT: All right.

MR. POST: May I hear again, your Honor, exactly what your Honor intends to say?

THE COURT: Yes. I will read them the question. I will read them again their question: "Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the accident, or is it only necessary to feel that it contributed to the accident?"

I will say to them, "The answer to your question is that it is not necessary to feel that the defective condition was the primary cause or the most probable cause of the accident. It is only necessary to feel that the defective condition contributed to the accident, but with the qualification that it must be a substantial contribution to the accident, not just a minute one."

And I will then by way of elaboration — well, I don't think it's necessary to then re-read the language I have given them on proximate cause, but I can do so. I think the answer would be complete at the point that I have just said. And if counsel agree with me that it would be — I appreciate, Mr. Post, that you think this whole approach is wrong, but I am perfectly happy not to burden the jury with a re-reading of the proximate cause language if I respond as I propose to do to the direct question they have put.

On the other hand, I have no difficulty about re-reading the proximate cause language.

MR. POST: If your Honor please, of course, for the record, I object.

THE COURT: Surely.

MR. POST: And in addition, I would ask that you reread the charge on proximate cause after making that statement, sir.

THE COURT: All right, I will do that.

MR. POST: Thank you, sir.

(The jury returned at 3:35 p.m., all parties being present.)

THE COURT: You must be amazed at how long it takes lawyers to formulate an answer to a question. You probably aren't amazed. You know how long it takes us to ask a question.

The question which you want answered again is this one, and this relates to Element No. 6, that which, just to remind you, requires that the defective condition was a proximate cause of the jury that Mr. Trapanese sustained.

Your question was this: "Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the accident, or is it only necessary to feel that it contributed to the accident?"

Let me read it again, it has been a day since you wrote it to me, so you may have forgotten.

"Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the accident, or is it only necessary to feel that it contributed to the accident?"

My answer to you is this:

> It is not necessary that you conclude that the defective condition was the primary cause or the most probable cause of the accident. It is only necessary that you conclude that the defective condition contributed to the accident, with this qualification, that it must be a substantial contribution. It can't be just a minute fractional contribution. So long as it is a substantial contribution, it need not be the primary cause.

Now, having said that, I will then re-read to you the language which I have already read to you at least twice about proximate cause in my instructions, which I think will be confirmatory of what I have just said.

"The sixth and final element of strict liability is proximate cause. The plaintiffs must prove not only that the unguarded buttons on the control station constituted a defect, but also that the defect was a proximate cause of the injuries suffered by Mr. Trapanese. An event or injury is proximately caused by an act or failure to act — in this case defendant's sale of its boring mill in an allegedly defective condition — whenever it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury. The act or omission need not be the only cause of the injury, but it must be a substantial, discernible cause. The fact that some other factor may have caused the injury does not relieve the defendant of liability unless you find that such other cause would have produced the injury independently of defendant's alleged act or omission."

So, in summary, the defective condition, provided that you find by a preponderance of the evidence that it had some substantial causative relation to the accident, it need not be the primary cause or most probable cause.

All right. Now, what is your pleasure? Do you wish to go back and deliberate further now or recess? Or do you want to talk about that?

JUROR NO. 3: I think, if it's all right, I think we would like to go back for at least a brief time.

THE COURT: All right. We are in your hands. You let us know. If after a little while you decide that you want to recess, let us know that.

(The jury retired at 3:40 p.m.)

(The jury returned at 4:35 p.m., all parties being present.)

THE COURT: Well, my friends, you have had a long day. Mr. Green tells me that he understands that you would think it sensible now to recess for the weekend. Is that correct?

JUROR NO. 3: Yes.

THE COURT: Is it your expectation, then, that when you do return on Monday you will be able to move forward?

JUROR NO. 3: In those parameters, yes, I think we can move forward.

THE COURT: Good. Then you can recess now, and if you will come back at 10 o'clock on Monday morning, I'll put you back to work at that time. Meanwhile, I wish you a very merry Christmas and good Christmas weekend.

(ADJOURNMENT AT 4:37 P.M.)

SECTION 1651 OF TITLE 28, UNITED STATES CODE

A). The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

F.R.C.P. 51

INSTRUCTIONS TO JURY: OBJECTION

At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign an error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

F.R.C.P. 59(d)

ON INITIATIVE OF COURT

Not later than 10 days after entry of judgment the Court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the Court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the Court shall specify in the order the grounds therefor.

82-2051

FILED
JUL 11 1983
ALEXANDER L. STEVAS
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

GIDDINGS & LEWIS MACHINE TOOL COMPANY,
Petitioner

v.

JOHN AND PATRICIA TRAPANESE,
Respondent

v.

HONORABLE LOUIS H. POLLAK,
Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. DID THE DISTRICT COURT PROPERLY EXERCISE ITS DISCRETION IN ORDERING A NEW TRIAL, AND DID THE THIRD CIRCUIT COURT OF APPEALS CORRECTLY REFUSE TO EXERCISE ITS DISCRETION TO REVIEW THE DISTRICT COURT'S ORDER BY MANDAMUS?

2. WHERE THE TRIAL COURT EXERCISED ITS DISCRETION BY ORDERING A NEW TRIAL TO CORRECT AN ERROR WHICH WAS REPEATEDLY PRESERVED ON THE RECORD, DID THE CIRCUIT COURT PROPERLY EXERCISE ITS DISCRETION BY REFUSING TO ISSUE A WRIT OF MANDAMUS TO REVIEW SUCH ORDER?

3. IS THERE ANY BASIS IN LAW OR FACT, EVEN UNDER THE EXPANSIVE CONSTRUCTION URGED BY PETITIONER, FOR THE ISSUANCE OF A WRIT OF MANDAMUS IN THE CONTEXT OF THIS CASE?

4. DOES PETITIONER'S GROUNDLESS AND FRIVOLOUS ATTEMPT TO CIRCUMVENT AND PERVERT LONG STANDING FEDERAL COURT PRACTICE REQUIRE THE IMPOSITION OF APPROPRIATE SANCTIONS?

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STATEMENT OF THE CASE

This is a strict liability case instituted pursuant to §402A of the Restatement of Torts 2d. Plaintiff, John Trapanese, was operating a Vertical Boring Mill manufactured by Defendant, Giddings and Lewis, when he inadvertently contacted an unguarded operating button on the machine's pendant control station. This caused the mill to begin rotating, ensnaring Plaintiff's left hand, resulting in the traumatic amputation of most of his left hand.

The case was tried before the Honorable Louis H. Pollak for a total of eight days, the substantial portion of said time being consumed by evidentiary arguments, and by Petitioner's unsupported collateral attacks on the credibility of Respondents' expert witness, Lester Moskowitz, R.P.E., said attacks having compelled Judge Pollak to render corrective jury instructions after several lengthy in camera proceedings. The jury deliberated for two and one-half days, returning during the time to ask no less than three (3) questions concerning the definition and elements of proximate cause. The jury entered a verdict for the Defendant on December 27, 1982, and judgment was recorded on the verdict on December 28, 1982.

Within ten (10) days of the entry of the judgment for Defendant, Plaintiff filed a Motion for a New Trial (a copy of which is included in Respondents' Appendix A). One of the primary grounds asserted by Plaintiffs was that the jury was inappropriately permitted to consider the issue of Plaintiff, John Trapanese' contributory negligence in the context of this strict liability case. Judge Pollak's Memorandum/Order of January 4, 1983, granting a new trial pursuant to Rule 59(d) of the Federal Rules of Civil Procedure, was premised on the Court's recognition of the impropriety of its permitting the jury to consider the issue of contributory negligence.

During the course of the trial of this case, the Defendant, Giddings and Lewis, continually offered evi-

dence that Plaintiff, John Trapanese' own neglect caused his accident. Initially, John Trapanese himself admitted having inadvertently bumped the pendant station. Defendant offered additional evidence that Mr. Trapanese should have been aware of the location of the pendant control station at all times, and that perhaps Mr. Trapanese himself activated the mechanism which severed his hand. Counsel for Defendant repeatedly asked Mr. Trapanese' co-employees if they had ever inadvertently activated the vertical boring mill through contact with the pendant station. There was sufficient evidence for the jury to conclude that Mr. Trapanese' own negligent conduct was the substantial cause of his accident. The Trial Court's Memorandum/Order of January 4, 1983 was therefore based on far more than, as alleged by Petitioner, mere "speculation".

Based upon the evidence presented by Giddings and Lewis Machine Tool Company, the Plaintiffs had submitted a set of proposed Supplemental Points for Charge, which included a point directing the jury not to consider Mr. Trapanese' contributory negligence, all of which were denied by the Trial Court. (A copy of Planitiffs' Supplemental Points for Charge is included in Respondents' Appendix B). Plaintiffs continually renewed their request for this charge throughout the jury's deliberations, but the Trial Court declined to so charge.

After trial, and after having the opportunity to reflect at length on this issue, the Trial Court recognized that it had erred in not charging the jury as Plaintiffs had requested. On January 4, 1983, Judge Pollack vacated the Judgment and ordered a new trial. Judge Pollak's Order was based on the clear inferences to be drawn from the record in its entirety, the questions posed by the jury, as well as the ultimate determination reached by the jury. There is not a scintilla of evidence, nor has Petitioner suggested that any evidence exists, to support its audacious assertion that the Trial Court or-

dered a new trial because the Trial Court was of the opinion that the jury verdict constituted an "undesirable outcome". Petition for Writ of Certiorari, page 4. Petitioner thereafter filed a Petition for a Writ of Mandamus with the Third Circuit Court of Appeals, which was denied without opinion by Order of March 24, 1983. A Pre-Trial Conference was immediately scheduled by Judge Pollak, but was cancelled when Defendant's counsel indicated that a Petition for Certiorari would be filed "very soon". (A copy of Judge Pollak's letter confirming this fact is contained in Respondent's Appendix C). Eighty-two days after the filing of the Third Circuit's Order, Petitioner, Giddings and Lewis Machine Tool Company, filed the instant Petition for Certiorari, presenting the same arguments which were rejected by the Third Circuit.

REASONS WHY WRIT SHOULD NOT ISSUE

Pursuant to the authority granted by Rule 59(d) of the Federal Rules of Civil Procedure, the District Court properly exercised its discretion in ordering a new trial of this case. The Court's ruling was premised on a finding that in the context of this strict liability case, the jury was improperly permitted to consider the issue of Plaintiff, John Trapanese' contributory negligence, contrary to well established Pennsylvania law. This issue was carefully and repeatedly preserved by Respondent's counsel, since the omission of the requested charge was critically prejudical to the Plaintiffs' case. Petitioner has not offered, nor can it offer, any evidence supporting its argument for the issuance of a writ of mandamus. There was no "clear abuse of discretion" or "usurpation of judicial power"; Petitioner has available to it "other adequate means to attain the relief sought" (i.e., appeal after a second trial); and there is absolutely nothing in the record which would indicate a "likelihood of recurrence". There exists no basis for the issuance of a Writ of Mandamus, and therefore the instant Petition must be denied.

I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN ORDERING A NEW TRIAL, AND THE THIRD CIRCUIT CORRECTLY REFUSED TO EXERCISE ITS DISCRETION TO REVIEW THE DISTRICT COURT'S ORDER BY MANDAMUS

Petitioner has come before this Court seeking extraordinary relief in the nature of the issuance of a Writ of Mandamus. Respondents respectfully submit that Petitioner has failed to allege facts which would support the granting of such relief; such facts simply do not exist in the context of this case. The filing of this Petition by Defendant, Giddings and Lewis, is nothing more than a transparent attempt to circumvent the final judgment rule, and has already resulted in substantial undue delay and expense — which is precisely what Petitioner purports to be attempting to avoid.

This Honorable Court has recently considered the issue of the scope of review by a Petition for Writ of Mandamus of an Order granting a new trial. *Allied Chemical Corporation, et al, Petitioners v. Daiflon, Inc.*, 449 U.S. 33, 66 L.Ed. 2d 193, 101 S.Ct. 188 (1980). *See also, U.S. v. Mehrmanesh*, 652 F.2d 766, 770 (9th Cir. 1980); *Kerr v. U.S. District Court for the Northern District of California*, 426 U.S. 394, 48 L.Ed. 2d 725, 96 S.Ct. 2119 (1976).

A review of the *Allied Chemical* decision reveals that the Petitioner herein has failed to recognize the distinction between the standard for review on appeal from a final judgment and the standard for review on a Petition for Writ of Mandamus.

Allied Chemical was a federal antitrust suit in which a jury awarded the plaintiffs $2.5 million in damages. The District Court thereafter granted the defendants motion for a new trial, acknowledging in its order that it had erred during trial in certain of its evidentiary rulings. The United States Court of Appeals for the Tenth Circuit issued a writ of mandamus directing the District Court to restore the jury verdict as to liability, while permitting the District Court to proceed with a

new trial on damages. On petition for writ of certiorari, the order of the Court of Appeals granting the writ of mandamus was reversed. The Supreme Court reiterated the very limited circumstances under which a writ of mandamus could properly be granted:

> This Court has recognized that the writ of mandamus "has traditionally been used in the federal courts only to 'confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *Will v. United States, supra*, at 95, 19 L Ed 2d 305, 88 S Ct 269, quoting *Roche v. Evaporated Milk Assn.* 319 US 21, 26, 87 L Ed 1185, 63 S Ct 938 (1943). Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy. *Will v. United States, supra*, at 95.

Id. 449 U.S. at 35, 66 L.Ed. 2d at 196.

The only accepted basis for mandamus review are jurisdictional excess and a clear abuse of discretion or usurpation of judicial power. The body of case law dealing with such jurisdictional issues typically concerns orders which are entered after a prescribed time period has expired, *see, e.g., Peterman v. Chicago, Rock Island and Pacific Railroad Co.*, 493 F.2d 88 (8th Cir. 1974), or which are entered in situations where the district court has failed to adhere to an order of the court of appeals. *See, e.g. Citibank; N.A. v. Fullam*, 580 F.2d 82 (3rd Cir. 1978), and numerous cases cited therein. The Order of the District Court in the matter *sub judice* was entered in strict conformity with Rule 59(d) of the Federal Rules of Civil Procedure, within ten (10) days of the date of the entry of judgment on the jury's verdict. There is nothing in the case law that would justify a fictitious expansive argument that there was action in excess of jurisdiction even if, arguendo, the court issued what may have been an erroneous discretionary ruling. As

was stated in *Cooper v. Midwest Feed Products Company*, 271 F. 2d 177, 179 (8th Cir. 1959):

> As the court had jurisdiction to enter the order, it had jurisdiction to enter a correct or an erroneous order. We express no opinion as to the correctness of the order further than to say that it was certainly not entered in clear abuse of the court's discretion.

Any allegation that the Trial Court acted outside the scope of its jurisdiction is unsupported in law or fact.

The only other situation in which mandamus can issue to reverse a grant of a new trial is where the Trial Court commits a clear abuse of discretion. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383, 74 S.Ct. 145, 98 L.Ed. 106 (1953); and *Grace Lines v. Motley*, 439 F.2d 1028 (2nd Cir. 1971). As held by the Third Circuit Court of Appeals in *Citibank v. Fullam*, 580 F.2d 82, 86 (3rd Cir. 1978), a finding of such abuse can be arrived at only under "extraordinary circumstances":

> The remedy of mandamus is a drastic one and should be invoked only under extraordinary circumstances. As the Supreme Court stated in *Will v. United States*, only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy. The reasons for this judicial reluctance to grant writs of mandamus are twofold. First, a mandamus action has the undesirable consequences of making a district court judge a litigant. More importantly, granting writs of mandamus in less than extraordinary situations would foster piecemeal litigation and would thus frustrate Congress' preference for appellate review only after final judgments. (citations omitted)

Judge Pollak ordered a new trial pursuant to a proper exercise of discretion, after concluding that the jury had erroneously been permitted to consider John Trapanese'

contributory negligence. The Trial Court's actions were well within its discretionary powers, and can hardly be considered a "judicial usurpation of power." *Id.*

This Court has taken the foregoing principles one step further, and has established a specific two-fold test for entitlement to relief:

> In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires, *ibid. Roche v. Evaporated Milk Assn., supra*, at 26, 87 L Ed 1185, 63 S Ct 938, and that he satisfy the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.' " *Bankers Life & Cas. Co. v. Holland, Supra*, at 384, 98 L Ed 106, S Ct 145, quoting *United States v. Duell*, 172 US 576, 582, 43 L Ed 559, 19 S Ct 286 (1899).

Allied Chemical Corp. v. Daiflon, Inc., supra, 449 U.S. at 35 66 L. Ed 2d at 197. Applying this test to the facts of this case, it is readily apparent that Petitioner Giddings and Lewis cannot even begin to meet its burden.

The first question is whether Petitioner has other means to attain the desired relief. Petitioner seeks relief from an Order granting a new trial, despite the fact that such an Order is considered interlocutory in nature and therefore not immediately appealable as a final judgment under 28 U.S.C.A. §1291.[1] *Wiggs v. Courshon*, 485 F.2d. 1281 (5th Circuit, 1973); *General Motors Corporation v. Lord*, 488 F.2d. 1096 (8th Circuit, 1974); Wright and Miller, *Federal Practice and Procedure*, Civil §2818 et seq. However, pursuant to the terms of 28 U.S.C.A §1291, Petitioner has an automatic right of appeal from such Order after the entry of final judgment. This procedure provides Petitioner with the necessary

1. 28 USCA §1291 in relevant parts read as follows: The courts of appeals shall have jurisdiction of appeals from all *final* decisions of the district courts of the United States . . .(emphasis added).

means to attain the desired relief. As held by this Court in *Allied Chemical, supra,* an order granting a new trial is commonplace and is always subject to proper appellate review:

> A trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of mandamus. On the contrary, such an order is not an uncommon feature of any trial which goes to verdict. A litigant is free to seek review of the propriety of such an order on direct appeal after a final judgment has been entered. Consequently, it cannot be said that the litigant "has no other adequate means to seek the relief he desires."

Id. 449 U.S. at 36, 66 L.Ed. 2d 197.

The second part of this Court's *Allied Chemical* test requires Petitioner to demonstrate that its "right to issuance of the writ is 'clear and undisputable.' " *Id.* Respondents again submit that the Trial Court's Order was nothing more than a sound exercise of discretion. Its decision was based on a fundamental, and in the context of this case, undisputed, legal principle that contributory negligence is not a defense to a strict liability suit in Pennsylvania. Having presided over the eight day trial of this case, Judge Pollak is best able to determine whether there was evidence presented from which the jury may have concluded that John Trapanese was contributorily negligent. A reversal of his Order would be nothing more than an improper substitution of one discretionary judicial opinion for another.

While Petitioner is entitled to disagree with the Trial Court's reasoning, it has offered nothing to suggest a clear abuse of discretion. Drawing again on this Court's opinion in *Allied Chemical Corp., supra,* it is apparent that the Trial Court did no more than properly exercise its discretionary power:

> The authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion

> on the part of the trial court. Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is "clear and indisputable." *Will v. Calvert Fire Ins. Co.*, 437 US 655, 666 57 LEd 2d 504, 98 SCt 2552 (1978) (plurality opinion).
>
> To overturn an order granting a new trial by way of mandamus indisputably undermines the policy against piecemeal appellate review. Under the rationale employed by the Court of Appeals, any discretionary order, regardless of its interlocutory nature, may be subject to immediate judicial review. Such a rationale obviously encroaches on the conflicting policy against piecemeal review, and would leave that policy at the mercy of any court of appeals which chose to disregard it.

Id.

A decision which perhaps best illustrates the impropriety of the relief Petitioner seeks is *General Motors Corporation v. The Honorable Miles W. Lord, et al*, 488 F.2d 1096 (8th Cir. 1973). That case involved a suit for damages for an alleged wrongful termination of franchises. After the jury returned a verdict for the defendant franchisor, the Trial Court granted a new trial because the Trial Judge was of the belief that he had erroneously permitted the jury to consider evidence of dealership agreement breaches which the franchisor did not assert as reasons for the termination of franchises. Whether or not the jury actually weighed such evidence in reaching its verdict was a determination which only the Trial Court, in the exercise of its sound discretion, could have made. The Court of Appeals therefore refused to substitute its own judgment for that of the Trial Court:

> The evidentiary issues confronted by the trial court, with respect to whether GM could rely on non-assigned reasons for termination as a defense

> to the law suit, are not simple. The trial judge's resolution of the issue is not without support. *See, e.g., Ohio & Mississippi R.R. v. McCarthy*, 96 U.S. 258, 267-268, 24 L.Ed. 693 (1877); *Luckenbach S.S. Co., Inc. v. W.R. Grace & Co., Inc.*, 267 F. 676, 679 (4th Cir.), cert. denied, 254 U.S. 644, 41 S.Ct. 14, 65 L.Ed. 454 (1920). On the other hand, resolution of the matter as GM urges also has support. *See, e.g., College Point Boat Corp. v. United States*, 267 U.S. 12, 16, 45 S.Ct. 199, 69 L.Ed. 490 (1925); 3 A. Corbin, Corbin on Contracts §762 at 524-526 (1960). Without intending to express an opinion on the merits, it is clear that the trial court's resolution of the issue was not so blatantly wrong as to justify the issuance of mandamus.

Id. 488 F.2d at 1100 (footnotes omitted).

In the case now before this Court, Judge Pollak was of the considered opinion that the jury was improperly permitted to consider the issue of John Trapanese' contributory negligence. He alone is in the position to weigh all of the evidence, consider the propriety of his corresponding instructions, and reach a determination as to whether the jury's verdict may have been tainted by improper considerations. This is a classic example of a proper exercise of discretion. This case is no different than *General Motors, supra*, and Petitioners request for the issuance of a writ of mandamus must be denied for the same reasons expressed by the Court of Appeals in that case:

> This evidentiary question, which was the essential question addressed by the trial court, is no different than any other evidentiary issue trial judges decide in the course of granting motions for new trial. To grant extraordinary relief here would be to abrogate the final judgment rule, and allow any litigant, who is forced to retrial on an

> evidentiary question, immediate review simply by styling his action a petition for writ of mandamus instead of appeal. The resolution of this question at this time would have little impact on the administration of justice generally and, since it is clear that the trial court had jurisdiction to act, mandamus is clearly inappropriate.

Id.

II. WHERE THE TRIAL COURT EXERCISED ITS DISCRETION BY ORDERING A NEW TRIAL TO CORRECT AN ERROR WHICH WAS REPEATEDLY PRESERVED ON THE RECORD, THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION BY REFUSING TO ISSUE A WRIT OF MANDAMUS TO REVIEW SUCH ORDER

Petitioner's argument is premised upon little more than a gross distortion of the record and a misunderstanding of the law. The Trial Court's Order granting a new trial was issued, because, after giving the matter careful consideration, it found that the jury should have been instructed not to consider the irrelevant issue of contributory negligence. This decision was supported by the evidence offered at trial, the arguments of counsel, the questions posed by the jury during its deliberations and the verdict ultimately rendered. This was far more than the mere "speculation" which Petitioner asserts was the basis for the Trial Court's decision.

Based on the evidence presented by Petitioner at trial, counsel for Respondents both offered a point for charge on the contributory negligence issue, and repeatedly urged the Trial Court to instruct the jury not to consider Mr. Trapanese' own negligence. It is difficult to conceive of any other manner in which this issued could have been preserved. Petitioner suggests none, but nonetheless makes the bald allegation that ". . . Respondent failed to properly preserve the issue upon which the Trial Court relied. . ." Petition for Writ of Certiorari, page 10.

Petitioner cites the following four decisions in support of its argument: *Skill v. Martinez*, 677 F.2d 368 (3rd Cir. 1982); *Kube v. Bethlehem Steel Corp.*, 390 F.2d 506 (3rd Cir. 1968); *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3rd Cir.), cert. denied, 364 U.S. 835, 81 S.Ct. 58 (1960); and *O'Neil v. D. R. Grace and Company*, 410 F.2d 908, 914 (5th Cir. 1969). Petition for Writ of Certiorari, pages 10-11. While it is submitted that ultimately, on proper appellate review after a new trial, the Trial Court's action will satisfy the requirements set forth in these decisions, Petitioner blatantly ignores the fact that the standard of review on a Petition for Writ of Mandamus is far more strict than on an appeal from a final judgment. "Mandamus" was not mentioned in any of the cited decisions. Petitioner does not even consider (as required by the governing case law) whether or not there was a "clear abuse of discretion", a "usurpation of judicial power", or whether it has other available means of attaining the relief sought.

The following review of the record demonstrates why Petitioner was reluctant (or perhaps unable) to address the real issues raised by the instant Petition:

Plaintiff, John Trapanese was operating a Vertical Boring Mill manufactured by Defendant, Giddings and Lewis when he inadvertently contacted an unguarded operating button on the machine's pendant control station. This caused the mill to begin rotating, resulting in a traumatic amputation. Pursuant to §402A of the Restatement of Torts 2d, the Plaintiffs contended that the subject boring mill was defectively designed in that the various operating mechanisms on the pendant control station were unguarded.

Petitioner offered a litany of defenses, but the common thread running between all of such defenses was an effort to convince the jury that in some way Mr. Trapanese carelessly caused his own accident. Initially, John Trapanese himself admitted having inadvertently bumped the pendant station.

Therefore, whether or not the jury even reached the question of the defective nature of the operating mechanism, they could have improperly concluded that Mr. Trapanese' own negligence was the substantial cause of his accident, and that any other contributing factors were insignificant. Had the jury been properly precluded from considering Mr. Trapanese' own conduct, their deliberations would have had to have focused on whether the unguarded buttons were defective, and whether they were a substantial factor contributing to the happening of the accident.

Defendant, Giddings and Lewis offered additional evidence that Mr. Trapenese should have been aware of the location and direction of the pendant control station at all times and that perhaps Mr. Trapanese himself activated the mechanism which severed his hand. Counsel for Defendant repeatedly asked Mr. Trapanese' co-employees if they had ever inadvertently activated the vertical boring mill through contact with the pendant station. Repeated references were made by Defendant's counsel to Mr. Trapanese' failure to set a gear switch, which purportedly may have prevented the accident. Mr. Trapanese was also questioned as to whether he may have slipped on grease or oil which he allowed to accumulate in the work area. Defendant's counsel also speculated before the jury that Mr. Trapanese may have allowed loose debris or a flying metal clip to activate the machine. There was thus more than sufficient evidence for the jury to conclude that Mr. Trapanese' own negligent conduct was the substantial cause of his accident. Thus properly viewed in the context of the full record, the Trial Court's Memorandum/Order of January 4, 1983, was certainly premised on a sound evidentiary base, and went well beyond the pure "speculation" alleged by Petitioner.

Petitioner's gross distortion of the trial record becomes abundantly clear, to the point of being repugnant, when one considers Petitioner's argument that the Trial

Court's Order was based on an issue not properly preserved for appellate review. Petitioner's need to resort to misleading selective citation from the record lays bare the frivolous and baseless nature of Petitioner's entire argument. The record demonstrates beyond dispute that Respondent repeatedly and forcefully preserved for review the issue of the Trial Court's failure to charge the jury that contributory negligence was not a defense to be considered:[2]

During the course of the trial, based upon the evidence presented by Giddings and Lewis Machine Tool Company, the Plaintiffs submitted a set of proposed Supplemental Points for Charge, which included a point directing the jury not to consider Mr. Trapanese' contributory negligence. (See Respondents' Appendix B). All of these proposed points were denied in an in chambers, off-the-record conference before Judge Pollak, (unfortunately, there was no transcription of any of the extensive discussions between counsel and the Trial Court concerning the multitude of Proposed Points for Charge) to which Plaintiffs' counsel took a general exception. Counsel for Respondent never acquiesced in the Court's decision. Petitioner chooses to ignore Respondents' submission of this Proposed Point for Charge, as well as the colloquy which followed the conclusion of the Court's charge:

> THE COURT: You can tell me now where I have slipped up if there are things *other than what we have already had discussions about and rulings on.*
> MR. SCHWARTZ: Your Honor, I take no issue with the charge as given. *Some of the Plaintiffs' requested points were not given,* but I assume that it's the Court's position they are in fact covered.

---

2. It is interesting to note that at no time has Petitioner challenged Respondent's construction of the law in this regard — i.e., it is undisputed that contributory negligence is not a defense to a §402A product liability claim under Pennsylvania law.

> THE COURT: That is my belief, yes.
> (Emphasis added.)

The Court was not inviting discussion on matters previously disposed of which, as clearly indicated by Respondents' counsel, included, *inter alia*, the requested point for charge dealing with contributory negligence. The fact that the omission to charge as requested remained as Respondents' counsel's foremost concern is borne out by his repeated efforts to convince the Court not to permit the jury to consider the issue of contributory negligence.

On the first day of its deliberations, the jury returned to ask several questions, expressing its confusion over the charge as given. One question was whether the alleged defect in the boring mill had to be "the primary or the most probable cause of the accident, or was it only necessary to feel that it contributed to the accident." Petitioner's Appendix, 10a. This question presented to Plaintiffs' counsel another clear indication that the jury was considering John Trapanese' negligent conduct, and Plaintiffs' counsel therefore strenuously argued that the jury should be instructed not to consider any evidence of contributory negligence:[3]

> MR. SCHWARTZ: Your Honor, I have a distinct impression that what is going through the minds of the jurors here is the conduct on the part of Mr. Trapanese as being one of the things that they are considering in light of the argument —
> (Petitioner's Appendix, 17a.)

After an interruption, Mr. Schwartz continued:

---

3. An appreciation of the extent to which this point was "brought home" to the Trial Court requires a reading of all of the discussions between the Court and counsel. However, *since Petitioner failed to cite a single quote* from Respondent's revealing arguments, the most salient portions of Respondent's arguments are set forth herein.

> Your Honor, I have a feeling that this jury is now in its deliberations on proximate cause, weighing the conduct of Mr. Trapanese in relationship to the operation of the machine, particularly in connection with certain arguments made by counsel concerning Mr. Trapanese' positioning the pendant station. We had asked for a charge that contributory negligence is not a defense to this case, as was assumption of risk. We still don't believe assumption of risk is necessarily at issue, but I believe it is important, since the jury is now talking about conduct, what caused this, that the jury be instructed that no conduct on the part of Mr. Trapanese can play any part in their deliberations, because contributory negligence or any conduct on his part is not a defense to a strict liability lawsuit. Counsel interjected this during the trial, your Honor. You are aware I objected to it because I said contributory negligence is not a defense. He argued that point tangentially in his summation and we asked for a point for charge on it.
> (Petitioner's Appendix A-18)

Although the Court disagreed at that time, Mr. Schwartz pressed his point further:

> MR. SCHWARTZ: Your Honor, I think the charge is less open in the minds of the jurors that possibly the conduct of Mr. Trapanese could be a substantial factor in bringing it about, i.e., positioning the pendant station so that he hits it or that he in fact might have hit it in some other fashion. In other words, I think what it's done is it's left the jury open to consider his conduct as being a substantial factor in bringing about the happening of the accident, when such would not be a defense to a 402(a) case, especially in light of the arguments made by defense counsel and the evidence that he put on this record about the twisting, if Your Honor recalls, the twist-

> ing of the buttons, so that it faces the machine as opposed to facing away from the machine, where the Plaintiff positioned the specific pendant station. Counsel said that he was there to establish it in terms of how the accident happened, and for that reason the Court let it in, but now the jury is talking about was his conduct, or thinking about whether his positioning was a substantial factor in bringing about this accident.
> (Petitioner's Appendix, A-19)

Mr. Schwartz made Respondent's position vividly clear, and afforded the Trial Court every opportunity to correct its error (despite Petitioner's absurd claim that this was not done):

> MR. SCHWARTZ: Your Honor, I agree to that point, but when the jury comes in with a question, and that question leaves open the fact that they are considering a defense, or the possibility that they may be considering a defense which under the law is not a defense, I see it as the obligation of the Court to instruct them that they are not to consider any conduct on the part of Mr. Trapanese as being a substantial factor, because that would go to a defense that are not entitled to have.
>
> I am not taking away the charge as given; it's correct. But the jury here must be considering, based on what we have in the way the case has developed, must be considering his conduct.
> (Petitioner's Appendix, A 19-20)

Respondent's counsel even proposed a method by which the Court's error might have been corrected without prejudice to either party:

> MR. SCHWARTZ: Your Honor, I was under the impression, your Honor, that it would be almost obligatory on the Court when the jury poses a question which has built into it the possibility that they may

> well be considering the defense to a suit which is not a defense, that it should be done. Now, Your Honor has a valid point of taking it totally out of context, so I would suggest, your Honor, you read back exactly what you have read, but simply adding the sentence that this would not apply to any conduct on the part of plaintiff as a substantial factor, and just read it again, read it without any contributory negligence, just add in a little sentence as you read it back to them, and it will be an instruction to them but not out of context, so that the jury doesn't think that anything Mr. Trapanese did, i.e., mispositioning the pendant station, swinging it, getting off without looking, are substantial factors in bringing about this accident.
> (Petitioner's Appendix, 21)

On its second day of deliberations, the jury again returned to the courtroom to ask for "a restatement of the answer to our second question yesterday . . . " Memorandum/Order of January 4, 1983. Counsel and the Court engaged in a further colloquy concerning whether or not the jury should be instructed not to consider Mr. Trapanese' own conduct. Respondent's counsel re-argued his position, this time making reference to Pennsylvania's landmark decision holding that negligence is not to be considered in a 402A products liability case:

> MR. SCHWARTZ: Well, I agree, Your Honor, that this is proper for you to say, "No, it does not have to be the primary."
>
> I think the jury is inviting your Honor to discuss with them the issue of whether or not the Plaintiff's conduct can have anything to do with the occurrence in the proximate cause sense because primary, as I understand it, means first in time element.

> I assume what they are talking about is the primary incident would have been the Plaintiff backing into it. I think again we are back to the issue that the jury is hung up on the plaintiff's conduct as it relates to proximate cause and based on the *Berkabile* [Berkabile v. Brantley Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975)] decision, the Court has, as I see it, the obligation to tell the jury that the Plaintiff's conduct can play no part in determining the liability because his acts do not relate to any defense in this case, and I think that's what their hang-up is, and that is why I indicated that that has to be clarified, because in terms of sequence, the first thing that would happen would be the Plaintiff backed up and hit a button. That would be the prime sequence of events.
> (Petitioner's Appendix, A 25-26)

There is much more on the record. Respondent challenges Petitioner to examine the above quotations from the record, and to advise Respondent and this Honorable Court how it intends to substantiate its argument that ". . . counsel failed to preserve any claim of error . . ." Petition for Writ of Certiorari, page 16.

The Court's decision not to charge as requested by Plaintiffs' counsel, reached in the heat of the trial, was premised on the Court's desire not to introduce the concept of contributory negligence to the jury. However, as evidenced by the Court's Post-Trial Memorandum/Order granting a new trial, upon further reflection after trial, the Court was of the opinion that there was evidence before the jury of Mr. Trapanese' own negligence. Therefore, the Court concluded that it was prejudicial error *not* to charge the jury to ignore such evidence. When the jury asked whether the alleged defect had to be "the primary or most probable cause of the accident", the only other thing they could have been considering was John Trapanese' conduct. Having been permitted to zero

in on such evidence, the jury was free to conclude that Mr. Trapanese' negligence was the substantial cause of his accident, regardless of whether or not they found that there were other contributing causes such as unguarded operating mechanisms. Judge Pollak had given the jury six (6) elements to consider in his original charge, a copy of which is included in Respondent's Appendix D. Since the jury had obviously reached the element number six (6), proximate cause, they had to have determined that there was a product defect (element number four (4)). Their verdict is therefore further proof that their foremost concern was John Trapanese' contributory negligence.

Judge Pollak ordered a new trial because he was of the opinion that the jury was improperly permitted to consider contributory negligence in its deliberations. His error was repeatedly raised during trial, jury deliberations and in Respondent's Post Trial Motions. His decision was based on his first hand knowledge of the entire record, and is supported by all of the legal authorities. Such an Order granting a new trial is purely discretionary. There is simply no basis for concluding that there was a "clear abuse of discretion" or a "usurpation of judicial power", and, therefore, the Petitioner for Writ of Certiorari before this Court must be denied.

III. THERE IS NO BASIS IN LAW OR FACT, EVEN UNDER THE EXPANSIVE CONSTRUCTION URGED BY PETITIONER, FOR THE ISSUANCE OF A WRIT OF MANDAMUS IN THE CONTEXT OF THIS CASE

Dissatisfied with the most recent pronouncement of this Court in *Allied Chemical Corp. vs. Daiflon, Inc., supra,* Petitoner's last resort is to plead for an expansive construction and application of the readily distinguishable 1957 decision in *LaBuy v. Howes Leather Co.,* 352 U.S. 249 (1957). Consistent with its approach to its first two argments, Petitioner totally ignores the facts of this case in presenting its third and final argument.

Assuming *arguendo* that the concept of "supervisory" mandamus has survived the twenty-six (26) years of inactivity since this Court's rendition of its *LaBuy* decision,[4] the full scope of the "supervisory" mandamus concept (if it exists at all) does not even begin to encompass the matter *sub judice*. The import of *LaBuy* has never been expanded beyond its own facts. That case involved the conduct of a single District Court judge who inappropriately referred complex, multi-party antitrust litigation for hearing by a master. The same judge had referred eleven (11) cases to masters over a six (6) year period. This Court found that there was ". . . an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an ad hoc basis and ordinarily not experienced in judicial work." *Id* at 259, 1 L.Ed. 2d at 299. The Court granted extraordinary relief in *LaBuy* primarily because of the continued pattern of aggregious conduct on the part of the trial judge, and the likelihood that it would continue. Although this crucial point is ignored by Petitioner, the commentator on whom Petitioner places heavy reliance makes this point abundantly clear:

> The implication has arisen from *LaBuy* that mandamus may be used to discourage an erroneous practice and prevent its recurrence, and in this context *it is the likelihood of recurrence and the need to prevent it that are the critical factors,* not the jurisdictional excess or usurpation of power which were determinative under the traditional standard.

(Emphasis added) *Can the Federal Courts Keep Order in their Own House? Appellate Supervision through Man-*

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4. Respondents submit that the Petition now before this Court must be dismissed before this issue is even reached, and are therefore willing to concede the existence of such concept for the sake of argument to facilitate the expeditious disposal of the frivolous Petition now before this Court.

damus and Orders of Judicial Council, 1980 B.Y.U.L. Rev. 233, 241 (1980) (footnotes omitted).

Petitioner makes the audacious accusation that ". . . in this instance, as in *LaBuy*, the likelihood of recurrence is great and the need to prevent such recurrence is paramount." Petition for Writ of Certiorari, page 23. Petitioner does not offer a single fact in support of this scandalous accusation against Judge Pollak, one of the most respected jurists on our Federal District Court bench. The Trial Judge's discretionary ruling was based on his application of the law to the facts of record in this case. There is no evidence that Judge Pollak has ever granted a new trial pursuant to Rule 59(d), and, even if he has, there is nothing to indicate that any other case even resembled the case presently at issue. This case presents an isolated instance of a Trial Court granting a new trial. Just as a multitude of litigants in our Federal Court system have for decades awaited their opportunity to be heard after a final judgment is entered, Petitioner will have to wait as well. There is nothing in this record to support Petitioner's transparent attempt at circumvention of the mandated final judgment rule.

Reviewing the large body of decisional law on the subject of mandamus, it is apparent that Petitioner is seeking relief which this Court and the Courts across this country have consistently and emphatically denied. As discussed above, this Court has just recently refused to grant mandamus review of a discretionary new trial order. *Allied Chemical Corporation, et al v. Daiflon, Inc., supra*. Even erroneous new trial orders which may ultimately be reversable on appeal are not reviewable by mandamus:

> Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power" into interlocutory review of nonappealable orders on the mere ground that they

> may be erroneous. "Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable." *De Beers Consol. Mines, Ltd. v. United States*, 325 US 212, 223, 225, 89 L Ed 1566, 1575, 1576, 65 S Ct 1130 (1945) (dissenting opinion of Mr. Justice Douglas).

Will v. United States, 389 U.S. 90, 95, 88 S. Ct. 269, 273, 19 L. Ed 2d 305, (1967). See also *U.S. v. Watson*, 603 F.2d 192 (C.C.P.A. 1979). Respondent submits that a re-trial of the instant case is mandated by the facts of record and the governing law. At worst, the Trial Court's Order in this regard was erroneous, and, even if it is, it is simply not reviewable by mandamus.

In the recent case of *In re United States of America, Petitioner*, 598 F.2d 233 (D.C. 1979), the court carefully considered *LaBuy* and *Will*, and decided that mandamus review of a new trial order was inappropriate:

> Nor need we enter the controversy as to whether these doctrines ["supervisory" and "advisory" mandamus] have survived *Will*, for they are inapplicable here. Petitioner is simply disputing the District Court's evaluation of what the "interest[s] of justice" require in this case. It would be singularly inappropriate to review this fact—specific discretionary determination by way of mandamus.

Id. at 238. The case at bar is no different.

IV. PETITIONER'S GROUNDLESS AND FRIVOLOUS ATTEMPT TO CIRCUMVENT AND PERVERT LONG-STANDING FEDERAL COURT PRACTICE REQUIRES THE IMPOSITION OF APPROPRIATE SANCTIONS

The final issue for consideration involves the propriety of Petitioner's conduct in refusing to submit to a second trial of this case. The actual trial of this case took eight days, with substantial portions of that time being consumed by collateral matters, unrelated to the merits

of the case. Now that these matters have been resolved by the rulings of the Trial Court, Respondents submit that this matter can be retried in approximately one week. Petitioner would be hard-pressed to find fault with this assessment, but nevertheless has decided to callously disregard the facts and the law, (and, in particular, the final judgment rule) to Respondents' severe and irreversible prejudice, and has blindly pressed forward to reach our highest appellate Court.

Initially, Petitioner fails to address the fact that the Third Circuit Court of Appeals has already ruled on Petitioner's request for relief. In reviewing that court's denial of the Petition for Writ of Mandamus, it is important to remember that ". . . issuance of the writ is in large part a matter of discretion with the Court to which the petition is addressed." *Kerr v. United States Dist. Ct.*, 426 U.S. 394, 403, 96 S. Ct. 2119, 2124, 48 L.Ed. 725 (1976). This matter was extensively briefed by both parties before the Third Circuit. That Court properly exercised its discretion in denying the relief sought. Petitioner has failed to demonstrate any basis for concluding that the Third Circuit Court of Appeals abused its discretion in deciding as it did. There thus exists no basis for a review of that decision, nor, more importantly, for the filing of the instant Petition for Writ of Certiorari.

The hardship and prejudice to be imposed upon Respondents by discarding well-founded rules of procedure and permitting extensive and time consuming interlocutory appeals, far outweighs the comparably minimal burden of re-trying this case. The "final judgment rule" was designed to prevent piecemeal litigation, and is adhered to in all but the most aggregious of circumstances. In *General Motors Corporation v. Lord*, 448 F.2d 1096 (8th Cir. 1973), the retrial of a matter which had taken seven weeks to try in the first instance was not considered sufficiently burdensome to justify the issuance of a Writ of Mandamus. Of course, even if such burden exists, it must still be demonstrated that the Trial Court clearly

abused its discretion or usurped its judicial power in ordering a re-trial. Not only has Petitioner failed to demonstrate that there was an abuse of discretion or a usurpation of power, but it has failed to consider that its improper attempt at piecemeal appellate review will ultimately prove to be *more burdensome* to the Courts and the litigants than if Petitioner had conformed to the law by having a single, comprehensive appellate review after the entry of a final judgment. This of course is the "other adequate means to attain the relief [Petitioner] desires", the very existence of which precludes review by mandamus.

In view of the fact that Petitioner has full knowledge of the foregoing realities it is truly difficult to imagine how Petitioner's conduct in bringing this matter to the Supreme Court of the United States can be justified. Despite the "lip service" which Petitioner pays to the issue of reducing the burden on our courts, the truth is that it is *Petitioner*, and Petitioner alone, who is placing unnecessary burden on our courts.

The following facts make this assertion self-evident: On January 4, 1983, a new trial was ordered. Had this matter proceeded to trial as scheduled, this case could have been resolved within weeks. All discovery has previously been completed, witnesses, experts and exhibits prepared, and legal arguments resolved. If necessary, a full-blown appellate review of *all* appealable issues could by now have been substantially complete. Instead, because of Petitioner's frivolous actions, six months have been forever lost without this matter having been tried. Many more months may pass before the litigants return to the courtroom, their memories having faded even more with the passage of time. Respondents and their counsel have expended in excess of Ten Thousand Dollars ($10,000.00), in addition to countless man hours, in opposing Petitioner's "mandamus" actions. The sad fact is that all of Petitioner's arguments will have to be re-addressed if a proper appeal is taken after a second trial. In

addition to the litigants', the resources of all three tiers of our Federal Court system have been unnecessarily taxed. These are the burdens which the final judgment rule and the policy against piecemeal litigation are designed to avoid.

Having knowingly abused our court system, Petitioner's frivolous, selfish and myopic approach must not go unpunished. If Petitioner is not sanctioned, every litigant will be invited to seek mandamus review of new trial and similar orders. The final judgment rule and its salutory goals will become little more than history. For these reasons and more, Respondents respectfully request that monetary and any other appropriate sanctions be imposed upon Petitioner pursuant to the authority of Rule 49.2 of the Rules of the Supreme Court. *See, e.g., Elmo C. Tatum, Petitioner, v. Regents of the University of Nebraska-Lincoln, et al,* U.S. , No. 82-6145, June 13, 1983.

CONCLUSION

Even under Petitioner's construction of the law, Petitioner has failed to demonstrate its entitlement to the issuance of a writ of mandamus. It has failed to show an abuse of discretion, a usurpation of judicial power, the absence of other means to attain the desired relief or the likelihood of recurrence. Respondents respectfully submit that the instant Petition for Writ of Certiorari must be denied, and sanctions must be imposed upon Petitioner, if the final judgment rule and its purposes are to be preserved.

Respectfully submitted,
ANAPOL, SCHWARTZ, WEISS & SCHWARTZ

BY: _____
ALAN SCHWARTZ, Esquire

BY: _____
LAWRENCE R. COHAN, Esquire

Office - Supreme Court, U.S.
FILED
JUL 11 1983
ALEXANDER L. STEVAS
CLERK

82 - 2051

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

GIDDINGS & LEWIS MACHINE TOOL COMPANY,
Petitioner

v.

JOHN AND PATRICIA TRAPANESE,
Respondent

v.

HONORABLE LOUIS H. POLLAK,
Respondent

APPENDIX TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN and PATRICIA HANDO TRAPANESE, h/w	:	
v.	:	Civil Action Number:
GIDDINGS and LEWIS MACHINE TOOL COMPANY	:	81-1161

ORDER

AND NOW, to wit, this day of , 1983, it is hereby ORDERED and DECREED that the verdict herein and the judgment entered thereon on the 27th day of December, 1982, be hereby set aside and vacated, and that Judgment be entered notwithstanding the verdict, or, in the alternative, a new trial be granted in the above captioned matter.

By the Court:

/s/ _____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN and PATRICIA HANDO TRAPANESE, h/w	:	
v.	:	Civil Action Number:
GIDDINGS and LEWIS MACHINE TOOL COMPANY	:	81-1161

PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR A NEW TRIAL

Plaintiffs, John and Patricia Trapanese, by their attorneys, ANAPOL, SCHWARTZ, WEISS & SCHWARTZ, hereby move this Court for an Order setting aside the verdict entered in favor of Defendant, Giddings and Lewis Machine Tool Company, and the entry of a Judgment in favor of the Plaintiffs Notwithstanding the Verdict, or, in the alternative, move this Court for an Order granting a new trial in the above-captioned matter, and in support thereof, aver as follows:

I. The verdict was against the weight of the evidence.

II. Based on the evidence presented, the only proper jury verdict would have had to have been for the Plaintiffs.

III. The Court committed prejudicial error by not permitting the jury to consider whether the "rail down" button (or any buttons other than the "run" or "jog" buttons) on the subject pendant control station were defective and were the cause of John Trapanese' accident, despite the fact that:

(a) Such evidence was consistent with the pleadings and discovery in this case;

(b) Such evidence was consistent with the expert reports submitted in advance of trial;

(c) The evidence at trial was that all buttons were to be guarded except stop buttons and particularly run and jog.

(d) The theory that the rail button may have been activated by an accidental or intentional depression was presented for the first time by Defendant's expert at the time of trial, and Plaintiffs' counsel was refused any opportunity to cross-examine on this issue.

(e) The presentation of this theory by the defense was a complete surprise, as it had not previously been set forth in any pleading, discovery, pre-trial memorandum or other format; and,

(f) Despite all of the foregoing, the Court erred in failing to permit Plaintiffs to cross-examine on this subject, or to otherwise offer rebuttal evidence on this subject.

IV. The Court compounded the aforesaid errors by improperly responding to the jury's questions during their deliberations, and permitting the jury to consider only the defective nature of the run and jog buttons.

V. The Court erred and compounded the prejudicial effect of the errors described in III and IV above, by failing to issue any ruling with regard to Plaintiffs' Motion to Compel Discovery, which was filed in advance of trial seeking the facts and opinions which were ultimately proferred at trial.

VI. The Court erred in permitting Counsel for Defendant to prejudice the Plaintiffs and the Plaintiffs' chief expert, Lester Moskowitz, and thereby tainting his testimony, by making unwarranted attacks and unfounded allegations that he was personally involved in a consumer fraud, that he was involved in a fraud with the State of New Jersey, and of the withdrawal of a sworn Affidavit suggestive of the fact that it was false.

VII. The Court erred by not precluding Defendant's experts from testifying as to accident reconstruction or test results because:

(a) Defendant improperly failed to provide Plaintiffs with copies of thirty-seven (37) photographs of the machine in question, which were in Defendants possession long before trial and which were the subject of specific discovery requests.

(b) Defendant similarly failed to provide Plaintiffs with the documents reflecting the specifications for the re-assembly of the subject machine which Defendant's expert reviewed.

(c) Defendants failed to establish a foundation for their argument that test results or conclusions reached by observation of an alleged "sister machine" had any relevance in this case.

VIII. The Court erred in its charge to the jury:

(a) By failing to charge as requested by Plaintiffs;

(b) By failing and denying Plaintiffs' request to charge that contributory negligence was not a defense in this case;

(c) By failing to charge that assumption of the risk was not a defense in this case;

(d) By failing to charge Plaintiffs' additional Supplemental Point For Charge;

(e) By failing to adequately charge the jury on circumstantial proof;

(f) By improperly charging the jury on the issue of proximate cause;

(g) By failing to properly define "substantial factor".

IX. The Court committed prejudicial error by offering the jury answers to the questions posed by the jury which were contrary to the law and evidence, and which

in effect directed the jury to enter a verdict for the Defendant; in particular:

(a) The Court permitted the jury to consider only whether the run or jog buttons were defective, when the only other theory presented for the cause of this accident (although this also was not substantiated by any credible evidence) was similarly premised on the existence of a defective unguarded button on the subject pendant station, and, the jury was not permitted to even consider said defect;

(b) The Court committed prejudical error by allowing the jury to consider whether John Trapanese' own conduct was a substantial or contributing cause to the happening of the subject accident.

X. The Court committed prejudicial error during a correction charge on Insurance by telling the jury that they as consumers, ultimately pay through premiums for all insurance claims.

XI. The Court committed prejudicial error by permitting Defendant's experts, Mr. Fink and Dr. Sander, to testify as to facts and opinions beyond those disclosed in Defendant's Answers to Interrogatories, Expert Reports and the parties oral agreement confirmed in writing.

XII. The Court erred by permitting Mr. Fink to testify as to the cause of the accident.

XIII. The Court committed error by refusing Plaintiffs' request for a new jury panel when defense counsel suggested to the jury that Giddings and Lewis was self-insured or, in effect, had no insurance.

XIV. The Court erred in not permitting the Plaintiff's to show:

(a) That the "sister machine" observed after the occurrence had guards, for both impeachment of

defendants' expert and evidence probative of the cause of the accident.

(b) That the Defendant in 1958 guarded all buttons on pendant stations, particularly in view of Defendants continued attempts to offer evidence of non-feasibility or non-defect.

XV. The Court erred by prohibiting Plaintiffs' expert, Mr. McWilliams from offering rebuttal testimony that the machine was further defective by virtue of the evidence offered for the first time by Defendants' experts at trial.

XVI. The Judge committed error by not permitting counsel for Plaintiffs to argue in his closing speech that the defense in this case was one of confusion.

XVII. Plaintiffs allege such further prejudical error as is revealed upon a review of the complete trial transcript.

Respectfully submitted,
ANAPOL, SCHWARTZ, WEISS AND SCHWARTZ

By: _____
ALAN SCHWARTZ, Esquire
LAWRENCE R. COHAN, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN and PATRICIA HANDO TRAPANESE, h/w	:	
vs.	:	CIVIL ACTION
GIDDINGS and LEWIS MACHINE TOOL COMPANY	:	NUMBER: 81-1161

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Rule 59 of the Federal Rules of Civil Procedure provides for a Motion for New Trial or Judgment Notwithstanding the Verdict (JNOV), to be served not later than ten (10) days after the entry of judgment. Judgment was entered on or about December 27, 1982, and, therefore, the enclosed Notice and Motion is timely.

Plaintiffs contend that there are numerous valid grounds for the entry of Judgment Notwithstanding the Verdict (JNOV) or for granting a new trial and hereby incorporates by reference the grounds asserted in Plaintiffs' Motion. In order for Plaintiffs to more specifically set forth their allegations in support of the instant Motion, it is necessary to obtain the Notes of Testimony from the trial.

It is respectfully requested that Plaintiffs be given the opportunity to file a brief in support of Plaintiffs' Motion For A New Trial in accordance with the briefing

schedule established by this Court once the Notes of Testimony are obtained.

Respectfully submitted,

By: _____

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Attorneys for Plaintiffs

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(215)735-03330

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN and PATRICIA HANDO TRAPANESE, h/w	:	
v.	:	Civil Action Number:
GIDDINGS and LEWIS MACHINE TOOL COMPANY	:	81-1161

CERTIFICATION

I, ALAN SCHWARTZ, ESQUIRE, do hereby certify that a true and correct copy of the within Motion, Memorandum of Law and proposed Order was personally served upon Barton Post, Esquire, counsel for Defendant, Giddings and Lewis Machine Tool Company, at his office address, 210 West Washington Square, 12th Floor, Philadelphia, Pennsylvania, on Wednesday, January 5, 1983.

ANAPOL, SCHWARTZ, WEISS & SCHWARTZ

By: _____
ALAN SCHWARTZ, Esquire
LAWRENCE R. COHAN, Esquire

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN TRAPANESE and PATRICIA HANDO TRAPANESE, H/W	:	Civil Action Number: 81-1161
v.	:	
GIDDINGS AND LEWIS MACHINE TOOL COMPANY	:	

PLAINTIFFS' SUPPLEMENTAL POINTS FOR CHARGE

1. You are instructed that contributory negligence is not a defense in this case. Giddings and Lewis may not escape liability even if you believe that John Trapanese was himself negligent, as long as you find that the Giddings and Lewis Vertical Boring Mill involved in this case was defective (as I have defined that term for you) at the time when it was manufactured and sold by Giddings and Lewis.

You are therefore not to consider whether nor not John Trapanese exercised due care or acted reasonably under the circumstances. Your determination of whether or not Giddings and Lewis is strictly liable under §402A of the Restatement of Torts, 2nd, must be made without considering such issues.

Similarly, you are not to consider balancing negligence or the question of comparative fault in your deliberations.

2. You are not to consider the questions of whether or not the Vertical Boring Mill in questions was properly used, properly maintained or whether or not it was at any time substantially changed, as such issues are not relevant in the context of this case. I instruct you that under the evidence presented as a matter of law you may not find that the machine in question was improperly

maintained, improperly used, or substantially changed. I have withdrawn all of these issues from your consideration.

3. Assumption of risk is not a defense in this case. I direct you to conclude as a matter of law that Mr. Trapanese did not assume any of the risks associated with the happening of this accident.

4. The Defendant, Giddings and Lewis, has stipulated with the Plaintiffs in this case that guarded operating buttons were available, practical and feasible, had Giddings and Lewis wanted to use them in their product for use in 1953 and as early as 1938. The genuiness of evidence concerning the availability of guarded Square "D" Company buttons in 1938 has also been the subject of this stipulation, Square "D" Company being the source of Giddings and Lewis buttons involved in this case.

5. When you are weighing the evidence presented to you, I instruct you that any expert opinion offered which you believe contradicts the facts which you believe to be true must be rejected. What the facts of this case are is for your determination alone, and you may reject any expert opinion which you believe is not supported by the facts.

6. I advise you that questions asked by counsel and comments made by counsel are not evidence in this case. You should not weigh such questions or remarks in your deliberations.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Chambers of
Louis H. Pollak
United States District Judge

13613 United States Courthouse
Independence Mall West
Philadelphia, Pa. 19106
215 597-9590

June 3, 1983

Barton L. Post, Esq.
Christopher H. Wright, Esq.
Post & Schell
12th Floor, 210 West Washington Square
Philadelphia, Pa. 19106

Re: *Trapanese v. Giddings & Lewis Machine Tool Co.*
Civil Action No. 81-1161.

Dear Messrs. Post and Wright:

After receiving notice of the Court of Appeals' denial of defendant's application for mandamus, I convened a telephone conference in early April with a view to moving this case back on track for retrial at an early date. During that conference, Mr. Wright, representing defendant, advised me and opposing counsel that defendant would very soon be filing a petition for certiorari. On the basis of that advice, I left undisturbed the stay on further discovery imposed when defendant filed its application for mandamus.

I am now informed by my law clerk, David Green, who very recently telephoned Mr. Wright, that Mr. Wright has advised him that a certiorari petition has not yet been filed.

I find this more than surprising: I had supposed that a certiorari petition was filed nearly two months ago. And, of course, the continuing stay of further proceedings in this delayed case was predicated on that supposition.

I expect to be informed at once whether, and if so when, a certiorari petition is to be filed. If defendant has abandoned its plan to petition for certiorari, an order will enter directing that discovery be resumed forthwith and concluded as quickly as possible.

Very truly yours,

cc: Alan Schwartz, Esq.
Office of the Clerk.

APPENDIX D

SUMMARY OF SIX ELEMENTS

We have now discussed all six of the elements or factual claims which plaintiff must prove in order to show that Giddings & Lewis is liable. Allow me to repeat them for you in summary fashion to insure that you have them all firmly in mind. The plaintiff must prove by a preponderance of the evidence:

(1) That Giddings & Lewis manufactured and sold the 64" verticle boring mill which allegedly caused Mr. Trapanese's injury;

(2) That Giddings & Lewis is in the business of selling such equipment;

(3) That the verticle boring mill at the time of the accident was without substantial change from the condition it was in at the time it left Giddings & Lewis's hands;

(4) That the boring mill contained a defect, that being the lack of guarded run and jog buttons on the pendent control station;

(5) That the defect existed at the time the boring mill was sold; and finally

(6) That the alleged defect was a proximate cause of Mr. Trapanese's injury.